United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL

76-7493

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United States Court of Appeals

For the Second Circuit.

MAX HABER, individually, and as executor of the Goods, Chattels and Credits that were of GEORGE HABER, Deceased, and MAX HABER, indiv.,

Plaintiff-Appellant,

against

THE COUNTY OF NASSAU and ROBERT SEHLMEYER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

Volume I—Pages 1a to 486.

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UNITED STATES COURT OF APPEALS
FILED
MAR 4 1977
MICHAEL RUBINO, CLERK
SECOND CIRCUIT

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1977

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

- -X

MAX HABER, as Executor of the Goods, Chattels and Credits that were of George Haber, Deceased, and MAX HABER, indiv.,

Plaintiffs-Appellants,

-against-

THE COUNTY OF NASSAU and ROBERT SEHLMEYER,

Defendants-Appellees.

- -X

DOCKET ENTRIES.

Date	Proceedings.
1973	
9-19	Complaint filed. Summons issued.
10-1	Summons returned & filed/executed.
11-23	Stipulation extending time to answer complaint 30 days filed.
11-23	ANSWER filed.
12-28	Notice of motion ret 1-4-74 for an order to dismiss the complaint and memorandum of law in support of motion filed.
1974	
1-4	Before MISHLER, CH. J. - Case called & adj'd to 1-18-73 on consent.

DOCKET ENTRIES

Date	Proceedings
1-18	Affidavit in Opposition to deft's motion filed (H. GLUSKIN)
1-18	Before MISHLER, CH. J. - Case called for hearing on motion to dismiss complaint. Motion argued. Motion denied.
1-21	By MISHLER, CH. J. - Order dtd 1-18-74 denying motion to dismiss complaint filed on back of document #5.
7-19	Before PLATT, J. - Case called. Adjd without date
9-3	Before PLATT, J. - Case called & adj'd to 10-18-74 at 10 A.M. to set a date for trial.
10-18	Before PLATT, J. - Case called - Deft's motion to dismiss - Motion granted - Settle order and notice
10-22	Notice of deft to take deposition of pltff filed.
10-22	Interrogatories of deft filed.
12-16	Memorandum of Law in Support of the Pltff's motion under Rule 60(b)(10) for an order vacating the dismissal filed.
12-20	Affidavit of Allen M. Taylor in Opposition to pltff's motion to vacate a prior dismissal, etc. filed.
12-20	Before PLATT, J. - Case called - Adjd to 12/27/74
12-27	Before PLATT, J. - Case called for hearing on motion to dismiss complaint. Motion denied as indicated. Pltff to pay deft atty $150.00 in counsel fees. Adj'd to 2-14-75 at 10 A.M. for pre-trial conference.
1975	
1-10	Pltff's Interrogatories to Defts filed.
1-13	Pltff's Answers to Interrogatories filed.

DOCKET ENTRIES

Date	Proceedings
2-14	Before PLATT, J. - Adjd to 2/28/75
2-28	Defts' answers to interrogatories filed.
2-28	Before PLATT, J. - Case called & adj'd to 3-21-75
3-21	Before PLATT, J. - Case called. Pre trial conference held & concluded.
3-27	Before PLATT, J. - Case called for hearing on motion to produce. Motion granted as indicated.
4-2	Before PLATT, J. - Case called. Documents produced and handed over to the court as directed.
4-1	Before PLATT, J. - Case called and adj'd to 5-30-75 for status report.
5-9	Before PLATT, J. - Case called and adj'd to 5-12-75.
5-12	Before PLATT, J. - Case called. Ready & holding.
5-30	Before PLATT, J. - 6/6/75 status.
6-6	Before PLATT, J. - Case called - Pre-Trial order to be submitted by 6/11/75 - Adjd to 6/20/75
6-20	Before PLATT, J. - Case called. Ready and passed.
7-14	Before PLATT, J. - Case called & adj'd to 12-1-75.
7-17	By PLATT, J. - Order to Show Cause ret 7-18-75 why an order should not be granted quashing the subpoena duces tecum filed.
7-18	Before PLATT, J. - Case called. Motion to vacate denied. Motion to quash subpoena. Decision deferred until trial.
11-25	By PLATT, J. - Order to show cause dtd 11-24-75 why an order should not be made dismissing the complaint against the county of Nassau etc filed. Order to show cause ret 11-26-75. (mg)

DOCKET ENTRIES

Date	Proceedings
11-26	Before PLATT, J. - Case called & adj'd to 12-19-75 at 11:30 A.M.
12-5	Copy of defts memorandum in support of motion to dismiss.
12-17	Memorandum of law in opposition to deft's motion to dismiss
12-17	Affidavit of Irving Friedberg filed. (mg)
12-30	Memorandum of Law filed. (mg)
1976	
1-9	Before PLATT, J. - Case called for hearing on motion for summary judgment. Motion argued. Decision reserved.
4-1	By PLATT, J. - Memo and order dtd. 3-31-76 that Nassau County's motion to dismiss pltff's complaint must be and the same hereby is denied filed. Copies mailed.
4-23	Before PLATT, J. - Case called for status report and adjd to 5-14-76
4-28	Before PLATT, J. - Case called for trial Trial ordered and begun Trial held and cont'd to 4-29-76
4-29	Before PLATT, J. - Case called - Trial resumed - Trial cont'd
5-3	Before PLATT, J. - Case called. Trial resumed. Pltff motion for mistrial and for a fine to be levied against deft Nassau County for failure to comply with a subpoena. Motion granted as to the fine. Deft Nassau County to pay a fine in the total of $250. Motion for mistrial withdrawn. Trial cont'd to 5-4-76.
5-4	Before PLATT, J. - Case called Trial resumed Pltff motion to withdraw third claim Motion granted on stip. Pltff motion for a mistrial denied Trial cont'd to 5-5-76

DOCKET ENTRIES

Date	Proceedings
5-5	Sten. transcript dtd. 4-29-76 filed.
5-5	Before PLATT, J. - Case called. Trial resumed. Deft motion to dismiss decision reserved. Adj'd to 5-6-76.
5-6	Before PLATT, J. - Case called Trial resumed Both sides present Deft renews all motions for dismissal and for a directed verdict Decision reserved Trial cont'd to 5-10-76
5-7	Before PLATT, J. - Case called. Trial resumed. Conf held & concluded. Trial resumed. 5-10-76.
5-10	Before PLATT, J. - Case called Trial resumed and cont'd to 5-11-76
5-11	Before PLATT, J. - Case called for trial Trial resumed Order of sustenance signed Jury returns with a verdict in favor of the deft Robert Sehlmeyer on claim 1 and in favor of pltff in sum of $100,000.00 on claim 2 and a verdict in favor of pltff in sum of $25,000.00 for a sum total of $125,000.00 Deft to renew all motions for a new trial on or before 5-21-76 Pltff to submit order Jury discharged Trial concluded.
5-12	By PLATT, J. - Order dtd. 5-11-76 of sustenance filed.
5-14	Motion to enlarge time with memo of law filed.
5-14	Before PLATT, J. - case called - adjd to 5-21-76.
5-24	Sten. transcript dtd. 5-3-76 filed.
6-11	Notice of motion for judgment N.O.V., ret 6-18-76 at 11:30 A.M. filed.
6-11	Memorandum of law in support of motion NOV filed.
7-9	Before PLATT, J. - case called - deft's motion to set aside verdict of the jury - decision reserved.
7-13	Stenographer's transcript dtd 4-29-76 filed.

DOCKET ENTRIES

Date	Proceedings
7-13	Stenographer's transcript dtd 5-6-76 filed.
9-9	By PLATT, J. - Memo & Order dtd 9-8-76 that defts' motion for judgment notwithstanding the verdicts is granted and judgment be entered for the defts dismissing the complaint filed. Copies mailed to parties.
9-9	Reply memorandum in support of defts' motion for judgment filed
9-9	Defts' memorandum of law filed.
9-9	Pltff's supplemental memorandum filed.
9-9	Pltff's memorandum in opposition to defts' motion for judgment filed.
9-9	Affirmation in opposition filed.
9-9	Pltff's request to charge filed.
9-9	Pltff's trial memorandum of law filed.
9-10	Judgment that the verdict against the deft, County of Nassau, is set aside and that the motion of defts, County of Nassau, and Robert Sehlmeyer, for judgment notwithstanding the verdict is granted and the complaint is dismissed filed.
10-5	Notice of appeal for pltff filed.
10-18	Undertaking for costs on appeal filed.
11-4	FILE CERTIFIED AND HANDED TO Roland W. Johnson. ng
11-8	Acknowledgment rec'd from C of A for receipt of record on appeal & filed.
11-23	Sten. transcript dtd May 3, 1976 filed.

DOCKET ENTRIES

Date	Proceedings
1977	
1-4	Sten. transcript dtd 5-14-76 filed.
1-4	Sten. transcript dtd 5-5-76 filed.
1-4	Sten. transcript dtd May 5, 1976 filed.
1-31	Sten. transcript dtd 5/11/76 filed.
2-11	Stenographer's transcript dtd 5/10/76 filed.

COMPLAINT.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

- -X

MAX HABER, as Executor of the Goods, Chattels and Credits that were of George Haber, Deceased, and MAX HABER, indiv.,

Plaintiffs,

-against-

THE COUNTY OF NASSAU and ROBERT SEHLMEYER,

Defendants.

- -X

Plaintiff demands a trial by Jury.

The plaintiff as and for his complaint against the defendants, THE COUNTY OF NASSAU and ROBERT SEHLMEYER, respectfully shows to this Court and alleges:

AS AND FOR A FIRST CAUSE OF ACTION AGAINST THE DEFENDANTS, THE COUNTY OF NASSAU AND ROBERT SEHLMEYER:

FIRST: Prior to the commencement of this action, the plaintiff, MAX HABER, was granted Letters Testamentary, as Executor under the Last Will and Testament of GEORGE HABER, deceased, and as such Executor has full power and authority prosecute this action.

COMPLAINT

SECOND: That at all times hereinafter mentioned, the defendant, THE COUNTY OF NASSAU, was and still is a municipal corporation, duly organized and existing under and by virtue of the laws of the State of New York.

THIRD: That the matter in controversy exceeds the sum of $10,000 exclusive of interest and costs.

FOURTH: That the plaintiff has complied with all the conditions precedent to the bringing of this action, and has complied with all the provisions of law, and that more than thirty days have elapsed since representation of the said Notice of Claim and said claim remains unadjusted, and the said COUNTY OF NASSAU, has failed and/or refused to make any adjustment thereof, and the plaintiff has prior to the bringing of this action, and within ninety days after the injuries herein described were received, duly served upon THE COUNTY OF NASSAU, Notice of His Intention to Sue upon the claims set forth and that one year has not elapsed since the happening of this accident.

FIFTH: That this action arises under Title #42 of the United States Code, Section 1343, 1983 and 1985 and the Court has jurisdiction of this action under Title #28 of the United States Code, Sections 1331, 1332 and 1343.

SIXTH: That at all times hereinafter mentioned and at all times pertinent to this complaint, the defendant, ROBERT SEHLMEYER, was a police sergeant of the County of

Nassau, and in doing the acts and things hereinafter set forth, said defendant was acting in their representative capacity, as stated under color of the laws and ordinances of the COUNTY OF NASSAU, State of New York and were acting within the scope of his employment, as a police sergeant and in furtherance of the business of the defendant, THE COUNTY OF NASSAU.

SEVENTH: That upon information and belief, at all times hereinafter set forth, the defendant, ROBERT SEHLMEYER, was authorized and required by the defendant, THE COUNTY OF NASSAU, to carry on his person, a police service revolver.

EIGHTH: That on the 29th day of September, 1972, the defendant, ROBERT SEHLMEYER, while acting within the scope of his employment as a police officer and without justification and with malice, reckless and wanton and willful abandon, did shoot and kill the plaintiff's intestate, GEORGE HABER.

NINTH: That the plaintiff's decedent and plaintiff have been subjected because of the above recited acts, to the deprivation by defendants, THE COUNTY OF NASSAU and ROBERT SEHLMEYER, under color of law, and under the customs and usage of the County of Nassau, State of New York, of rights, privileges and immunities secured to them by the

Constitution and laws of the United States and particularly decedent's right under the First Amendment to said United States Constitution, his right to security of person and freedom from arrest, except upon probable cause supported by oath or affirmation, guaranteed by the Fourth Amendment to said Constitution, his right to be informed of the true nature and cause of the accusation against him guaranteed by the Sixth Amendment to the said Constitution, and his right not to be deprived of life and/or liberty without due process of law guaranteed by the Fifth and Fourteenth Amendments to the said Constitution; his right reserved or retained under the Ninth and Tenth Amendments to said Constitution and his right to life, as well as his right to the equal protection of laws guaranteed under Fourteenth Amendment to the Constitution.

TENTH: The plaintiff alleges that in doing the acts and things above complained of, the defendants, the conspirators engaged in a scheme and conspiracy designed and intended to deny and deprive plaintiff's decedent of his rights guaranteed to him under the Constitution and the laws of the United States, and particularly those hereinabove enumerated and in particular his right to life.

ELEVENTH: That the plaintiff alleges that as a direct consequence and result of the acts of the defendants,

COMPLAINT

THE COUNTY OF NASSAU and ROBERT SEHLMEYER, hereinabove complained of, plaintiff was deprived of life and liberty, on the 29th day of September, 1972.

TWELFTH: That as the result of the foregoing, plaintiff seeks damages provided under Title #42 of the United States Code, Section 1343, 1983 and 1985 in the sum of ONE MILLION and 00/100 ($1,000,000.00) DOLLARS; plaintiff further seeks punitive damages in the sum of ONE MILLION and 00/100 ($1,000,000.) DOLLARS.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST THE DEFENDANTS, THE COUNTY OF NASSAU AND ROBERT SEHLMEYER:

THIRTEENTH: This plaintiff, MAX HABER, repeats, reiterates and realleges, each and every allegation contained in paragraphs numbered "FIRST" through "ELEVENTH" of this complaint with the same force and effect as if the same had been fully set forth at length herein.

FOURTEENTH: That decedent, GEORGE HABER, left him surviving next of kin, including MAX HABER, his father and his mother.

FIFTEENTH: That as the result of the foregoing, the plaintiff, on his own behalf, and as Executor of the Estate of GEORGE HABER, deceased, was caused to lose support, comfort, counsel, advice and benefits that a father would expect from his son; and the plaintiff has been

damaged in the sum of ONE MILLION and 00/100 ($1,000,000.00) DOLLARS: in addition, the plaintiff seeks punitive damages in the sum of ONE MILLION and 00/100 ($1,000,000.00) DOLLARS.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST THE DEFENDANT, THE COUNTY OF NASSAU:

SIXTEENTH: The plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs "FIRST" through "ELEVENTH" of the complaint, with the same force and effect as though set forth hereto at length.

SEVENTEENTH: That at all times herein set forth and prior thereto, the defendant, THE COUNTY OF NASSAU, knew or should have known or had sufficient information of the facts and circumstances prior to September 29th, 1972, from which the defendant, the COUNTY OF NASSAU, could have or should have ascertained that the defendant, ROBERT SEHLMEYER, had vicious tendencies was emotionally unstable and was not a proper person to entrust with a service revolver.

EIGHTEENTH: That on the 29th day of September, 1972, the defendant, ROBERT SEHLMEYER shot and killed the plaintiff's decedent, GEORGE HABER, at the Nassau Coliseum, Uniondale, Long Island, in the County of Nassau, State of New York.

COMPLAINT

NINETEENTH: That as the result of the foregoing, the plaintiff was caused to lose support, comfort, counsel, advice and the benefits that a father would expect from his son, and the plaintiff has been damaged in the sum of ONE MILLION and 00/100 ($1,000,000.00) DOLLARS; the plaintiff also seeks punitive damages in the sum of ONE MILLION and 00/100 ($1,000,000.00) DOLLARS.

AS AND FOR A FOURTH CAUSE OF ACTION AS AGAINST THE DEFENDANTS, THE COUNTY OF NASSAU AND ROBERT SEHLMEYER:

TWENTIETH: The plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs numbered "FIRST" through "NINETEENTH" inclusive, with the same force and effect as if the same had been fully set forth at length herein.

TWENTY-FIRST: That the decedent continued to live for some time after sustaining such injuries as aforesaid but died as the result thereof.

TWENTY-SECOND: By reason of the premises, the decedent herein became sick, sore, lame and disabled, and continued during the period aforementioned to be so sore, sick, lame and disabled and suffered great physical pain and anguish, was compelled to undergo medical care and attention and to expend and incur liability for medical care and attention and funeral expenses.

COMPLAINT

TWENTY-THIRD: That as a result of the aforesaid, the plaintiff has been damaged in the sum of FIFTY THOUSAND and 00/100 ($50,000.00) DOLLARS.

AS AND FOR A FIFTH CAUSE OF ACTION AGAINST THE DEFENDANT, ROBERT SEHLMEYER:

TWENTY-FOURTH: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs numbered "FIRST" through "ELEVENTH" of this complaint, with the same force and effect as if the same had been fully set forth at length herein.

TWENTY-FIFTH: The plaintiff alleges that in doing the acts and things above complained of, the defendant, ROBERT SEHLMEYER, acting under the color of law, and within the scope of his employment, as a patrolman and without justification, and with reckless, wanton and willful disregard for the rights of the decedent, GEORGE HABER, did shoot and kill the plaintiff's decedent, GEORGE HABER, on the 29th day of September, 1972, at the Nassau Coliseum, Uniondale, Long Island, County of Nassau, State of New York, that at the time and place aforesaid, ROBERT SEHLMEYER, used excessive force, with malious and did shoot to kill and did kill, without provocation, or just cause, the decedent, GEORGE HABER.

COMPLAINT

TWENTY-SIXTH: That as the result of the foregoing, the plaintiff seeks compensatory damages against the defendant in the sum of ONE MILLION and 00/100 ($1,000,000.00) DOLLARS.

WHEREFORE, the plaintiff demands judgment against the defendants THE COUNTY OF NASSAU and ROBERT SEHLMEYER, on behalf of the first cause of action in the sum of $1,000,000. compensatory damages and $1,000,000. punitive damages; plaintiff demands judgment in the second cause of action against the defendant, COUNTY OF NASSAU and ROBERT SEHLMEYER, in the sum of $1,000,000. compensatory damages and $1,000,000 punitive damages; plaintiff demands judgment against the defendants, COUNTY OF NASSAU, in the third cause of action, in the sum of $1,000,000. for compensatory damages and $1,000,000. for punitive damages, plaintiff demands judgment against the defendants, THE COUNTY OF NASSAU and ROBERT SEHLMEYER, in the fourth cause of action, in the sum of $50,000.00 for compensatory damages; and the plaintiff demands judgment against the defendants ROBERT SEHLMEYER, in the fifth cause of action in the sum of $1,000,000. for compensatory damages and $1,000,000. for punitive damages, all together with the costs and disbursements of this action.

LEONARD SHEFT
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Tel. No. (212) 571-0925

ANSWER.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

MAX HABER, as executor of the Goods, Chattels and Credits that were of GEORGE HABER, Deceased, and MAX HABER, individually,

Plaintiff,

-against-

THE COUNTY OF NASSAU, and ROBERT SEHLMEYER

Defendants.

----------x

VERIFIED ANSWER

73 C 1408

Defendants, by their attorneys, BOWER & GARDNER, as and for an Answer to the Complaint herein allege:

FIRST: Denies knowledge or information sufficient to form a belief as to Paragraphs "FIRST" and "FOURTEENTH".

SECOND: Denies upon information and belief the allegations contained in Paragraphs "THIRD", "FIFTH", "EIGHTH", "NINTH", "TENTH", "ELEVENTH", "TWELFTH", "FIFTEENTH", "SEVENTEENTH", "EIGHTEENTH", "NINETEENTH", "TWENTY-FIRST", "TWENTY-SECOND", "TWENTY-THIRD", "TWENTY-FIFTH" and "TWENTY-SIXTH".

THIRD: Denies knowledge or information sufficient to form a belief as to Paragraph "FOURTH", and leaves all questions of law to the Honorable Court.

ANSWER

FOURTH: Repeats each admission or denial heretofore made in response to Paragraphs "THIRTEENTH", "SIXTEENTH", "TWENTIETH" and "TWENTY-FOURTH".

AS AND FOR A FIRST, SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, THE DEFENDANTS HEREIN ALLEGE:

FIFTH: That at all times mentioned in the Complaint, the defendant, COUNTY OF NASSAU, maintained and operated a Police Department as provided for by law and the police officers attached to said Department were obliged to detect and supress crime and apprehend offenders of the law, and at the time of the occurrence complained of in the complaint, the defendant, ROBERT SEHLMEYER and THE COUNTY OF NASSAU, were entaged in the suppression of crime and apprehension of plaintiff's decedent as a violator of the law.

AS AND FOR A SECOND, SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, THE DEFENDANTS HEREIN ALLEGE:

SIXTH: At no time mentioned in the complaint, did the COUNTY OF NASSAU, nor its police officers, including the said ROBERT SEHLMEYER, commit any of the acts alleged in the complaint, but if it be deemed that such acts were committed,

within the scope of the employment of said police officers, the acts performed by the said officers, including the said ROBERT SEHLMEYER, were justifiably performed in good faith, without malice and with reasonable and probable cause, in the performance of their duties as police officers of the COUNTY OF NASSAU.

AS AND FOR A THIRD SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, THE DEFENDANTS HEREIN ALLEGE:

SEVENTH: That at the times complained of in the complaint, the COUNTY OF NASSAU and defendant, ROBERT SEHLMEYER were engaged in the protection of innocent bystanders against the criminal acts of the plaintiff's intestate.

AS AND FOR A FOURTH SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, THE DEFENDANTS HEREIN ALLEGE:

EIGHTH: Whatever injuries plaintiff's intestate may have sustained, if any, at the time and place and upon the occasion mentioned in the Complaint, were caused in whole or in part, or contributed to or due to the negligence and fault or want of care on the part of the plaintiff's intestate, without any negligence or fault or want of care on the part of the defendants contributing thereto.

ANSWER

AS AND FOR A FIFTH SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, THE DEFENDANTS HEREIN ALLEGE:

NINTH: That there is a prior action pending in the Supreme Court of the State of New York, County of Nassau, between the same parties, for the same causes of action as asserted in the plaintiff's complaint herein.

WHEREFORE, the defendants demand judgment dismissing the complaint with costs and disbursements.

BOWER & GARDNER

By: DANIEL SIFF
A Member of the Firm
Attorneys for Defendants
Office & P.O. Address
415 Madison Avenue
New York, New York, 10017

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

HABER, :

73-C-1408

Plaintiff, :

-against- :

NASSAU COUNTY, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

April 29, 1976
9:30 o'clock A.M.

B e f o r e :

HONORABLE THOMAS C. PLATT, U.S.D.J.

Official Court Reporter
U. S. District Court

STEVE TESSLER
ACTING OFFICIAL COURT REPORTER

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

Steven A Tessler

Official Court Reporter
U. S. District Court

A1

MR. WEITZ: There is a witness in the Court, can we have that individual or those individuals excused. I know Mr. Gardner isn't here yet, I don't know if he wanted me to start with him or wait for him to come in.

THE COURT: We're moving to exclude witnesses yesterday, you're moving to exclude witnesses; I say are you moving to exclude witnesses. Yesterday you were moving to include witnesses.

MR. WEITZ: I'm sorry I don't understand what the Court is saying.

THE COURT: Yesterday I said that the mother of the plaintiff must be excluded hereafter and you made quite an argument, she should be in. The question is are you moving to exclude witnesses.

MR. WEITZ: Yes, I am.

THE COURT: Do you join in that motion?

MR. GARDNER: I think a motion of that sort should be made at the beginning of the case.

THE COURT: It doesn't make a difference. You can make it anytime. The question is do you join in the motion? If I get it for one side I assume I'll get it for both.

MR. GARDNER: I have no objection.

A2

THE COURT: All witnesses from both sides will be excluded.

MR. WEITZ: Your Honor, I wish to call the importance -- I instructed my client to be here a quarter after nine. It's almost 9:47, they're not here, they come from a considerable distance.

THE COURT: Are you ready with anyone?

MR. WEITZ: I have issued subpoenaes for a number of people, Mr. Salmyer among them. I have my process server here to testify to service of the subpoena and the acceptance of the mileage fee. I subpoenaed the Nassau County Police Department and a detective Fain, or Fehnn. I have my process server here to testify to that. It seems that the Federal process means nothing to defendants in a lawsuit.

Nobody is here. I intended to put the defendant Salmyer on the stand as my first witness.

MR. GARDNER: If I might respond to the first issue raised with the subpoena served upon Sargent Salmyer.

As a result of conversation last night Sargent Salmyer is somewhere upstate, has been for some time on sick leave and I believe he is somewhere past Saratoga. It's either Saratoga or Warren County

A3

which is the northern district, so he is not within this district and he is not within 100 miles or 200 miles of the courthouse. The subpoena falls on its face. I got no notice or bequest as to whether or not he wanted to use Salmyer or no request from him whether or not any arrangement --

THE COURT: Mr. Weitz, did you serve him within 100 miles from New York? Lake Lucerne, New York.

If you served him beyond 100 miles it's no good.

MR. WEITZ: I want to make an offer of proof, that is I did serve him.

THE COURT: If, under the rules it's my recollection no witness can be encumbered to come over 100 miles.

MR. WEITZ: He is a party to the action, your Honor.

THE COURT: He is subpoenaed as a witness as far as you are concerned. I imagine against the New York Telephone Company, they had to go up and take the testimony of a witness, he was in the scene, more than 100 miles, Albany, same district. You have to take his testimony in -- you're probably entitled to your money back. Unless papers required he be

A4

served anyplace in the district, or out of the district, or within 100 miles within the area supplied by subpoena and when a statute of United States applied, therefore the Court upon proper application can serve a subpoena in other places.

MR. WEITZ: Your Honor, then I would make application right now to reserve this individual for Monday morning.

THE COURT: When a statute of the United States provides therefor I don't think any of the civil rights statutes prove therefore.

MR. WEITZ: Is my application denied?

THE COURT: Show me a statute that shows that information and I'll -- have you read the statute?

MR. WEITZ: I'll have someone check, your Honor. Will the Court take judicial notice that Mineola, Long Island is not within 100 miles of the courthouse? Unless Mr. Gardner will concede that, if she testified -- if she will testify on the Nassau County Police Department.

THE COURT: I understand from my law firm that the District Attorney called in -- I think they received it. There is no doubt that Nassau County received it and we told them to come in here at 9:30.

A5

MR. WEITZ: How many from the DA's office is here in connection with the Grand Jury minutes.

THE COURT: Isn't that what you wanted?

MR. WEITZ: No, sir. Detective Fehnn, the fellow who compiled the witness' statement, I wanted the statements of these witnesses that were taken in question and answer form.

THE COURT: You know why Nassau County hasn't complied?

MR. WEITZ: I have a process server outside --

THE COURT: I don't have to practice law for you.

MR. WEITZ: Your Honor, I have to step outside to do it.

If your Honor pleases, he says he has no connection with the Nassau County Police Department.

THE COURT: Step up here will you, sir. From what office, with what office are you associated?

THE WITNESS: I am Assistant District Attorney for the County of Nassau.

THE COURT: You have no connection with the Nassau County Police Department?

THE WITNESS: The Police Department is represented by the County Attorney.

THE COURT: You can call the Nassau County Police Department and find out why they have not honored their subpoena.

MR. GARDNER: I am not sure what subpoena Mr. Weitz is making reference to.

One, to the District Attorney for the minutes.

THE COURT: We're going to settle that before he makes his telephone call.

What about the minutes?

THE WITNESS: Last July, when I was here I spoke to the court reporter who took those minutes on that day. He said they were never typed up because no true bill was had from that. It's about 500 pages, your Honor.

MR. GARDNER: May I quote on the motion, your Honor, indicates that there was no discovery of those minutes.

THE COURT: They're not going to be, discovery. I told that to Mr. Weitz, if he wants them typed up so I can look at them, so he can use them on appeal. He's entitled to that.

If I feel there is any need for us of them during the trial I will let him use it. If you want to pay for that Mr. Weitz $500 about.

A7

MR. WEITZ: I will pay for it.

THE COURT: For the session on Monday morning, either through your office or directly, and have them give you an explanation why they have -- tell them the Court will not tolerate any delay. Get them in here. Are you ready to go?

MR. WEITZ: I have a detective Fehnn here.

I want to put him on the stand.

THE COURT: You're not ready to go, I might have to dismiss this case.

MR. WEITZ: In other words, your Honor, if the defendant does not recognize that the Court process does not appear so that I can make out a prima facie case, I cannot get a continuance in trial.

THE COURT: I instructed the Nassau County --

MR. WEITZ: That wouldn't produce a witness.

In other words, the Court will wait for a witness.

THE COURT: I will wait for the plaintiff. If he doesn't show maybe you're getting out of Court. You get on -- out of Court, sir, and make your telephone calls. Explain to them that the Nassau County is a party here.

MR. WEITZ: I do understand, your Honor, there

A8

was some problem with the rails this morning, and I don't know if my client travels from Spring Valley by train to the courthouse, or by bus.

There is a wire down blocking one of the tracks coming in to Grand Central. I would like the Court's indulgence to find out if I can --

THE COURT: Find out as quickly as possible. Who is the witness in the witness room?

MR. GARDNER: A man by the name of --

MR. WEITZ: The lady in the courtroom.

THE COURT: No, the witness in the witness room?

MR. WEITZ: Effler, Alan Effler.

He was at the scene.

THE COURT: Why can't he put him on, or he's a witness for you?

Did you subpoena him?

MR. GARDNER: I did not, he subpoenaed him. I am not going to tell him how to try his case.

THE COURT: I am going to tell him to put that witness on.

MR. WEITZ: Your Honor, I don't know where my plaintiffs are. I'll proceed by reading deposition.

THE COURT: Put Mr. Effler on the witness stand.

MR. WEITZ: I don't put witnesses on the stand

without knowing anything about them, Judge. I am going to read depositions.

THE COURT: Why did you subpoena him for?

MR. WEITZ: I understand he was a possible witness, Judge.

THE COURT: Why don't you put him on the witness stand. Do you intend to put him on the witness stand?

MR. WEITZ: I don't know, Judge. I intend to read depositions. Since the defendant -- I have no alternative but to read a deposition. I am not going to read the entire deposition. I don't want to be bound by everything that is said in there. But I will read some of it.

THE COURT: I am going to take into consideration whether I am going to fine both Mr. Fehnn from Nassau County or whether I am going to fine you for not having proceeded a half hour ago to read this deposition.

MR. WEITZ: I intended to put Mrs. Haber on first, Judge.

THE COURT: I'll take it into consideration to see what course of action -- we kept the jury waiting one half hour.

A10

MR. WEITZ: I have another motion I would like to make to the Court.

THE COURT: You have kept the Court and this Jury waiting a half hour. I am sorry but the attorneys have not been ready with their witnesses and Mr. Weitz is going to read. It will begin with a reading of a portion of the deposition. You may proceed.

* * *

Appearances:

HARVEY WEITZ, ESQ.
Attorney for Plaintiff

JOHN GARDNER, ESQ.
Attorney for Defendant

MR. WEITZ: (Reading)

"Question: Will you state your name and home address?

"Answer: Robert Sehlmeyer, 54 Marino Avenue, Port Washington, New York.

"Question: Will you tell me for what period of time you have resided at the address you just gave?

"Answer: Approximately seven months.

"Question: Could you tell me where you lived prior to that time?

"Answer: 396 Powell's Lane, Westbury, New York.

"Question: For what period of time did you live at the Powell's Lane address?

"Answer: Approximately one and one-half year.

"Question: Will you state your address prior to your Powell's Lane address?

"Answer: 46 Fordham Street, Williston Park, New York.

"Question: And for what period of time did you live in Williston Park?

"Answer: Approximately five years.

"Question: Did you have any address prior to your residence in Williston Park?

"Answer: Yes, I did.

"Question: And what was that?

"Answer: 22 Pyram Street, Commack, New York.

"Question: And how long did you live there?

"Answer: Approximately five years.

"Question: Can you give me your date of birth, sir?

"Answer: June 6, 1930.

"Question: Will you give me your height and weight?

"Answer: Six foot three. 180 lbs.

"Question: Are you married?

"Answer: I am.

"Question: Were you married on September 29, 1972?

"Answer: Yes.

"Question: Do I take it that on September 29, 1972 you lived at 396 Powell's Lane in Westbury?

"Answer: No, I did not.

"Question: Where did you live at that time?

"46 Fordham Street, Williston Park.

"Question: On September 29, 1972 were you employed?

"Answer: Yes, I was.

"Question: Can you tell me by whom and in what

capacity?

"Answer: I was employedby the Police Department, County of Nassau, New York, as a sergeant.

"Question: How long prior to September 29, 1972 were you employed by the Police Department, County of Nassau in any capacity?

"Answer: Approximately seventeen years, sir.

"Question: Do you have any present recollection of the date you first became employed by the Police Department of the County of Nassau?

"Answer: April 16, 1956.

"Question: And prior to becoming employed on April 16, 1956 did you have any other employment?

"MR. MC DONOUGH: You mean before he became a police officer what was his job?

"MR. FRIEDBERG: Yes.

"MR. MC DONOUGH: I'll object to it as irrelevant and beyond the scope of the deposition.

"I'll allow him to answer over my objection.

"Answer: Yes, sir. I was.

"Question: Can you tell me in what capacity you were employed?

"Answer: I was an apprentice electrician.

"Question: Can you tell me the name of your

employer last preceding your entry into the Police Department?

"Answer: No, sir, I cannot.

"Question: Do you remember the name of any employer at the time that you were employed as an apprentice electrician?

"Answer: Hudson Electric.

"Question: Is that in Nassau County, New York or can you give me the location?

"Answer: I believe it's in Nassau County some place. I don't know their address, sir.

"Question: When you became a member of the Nassau County Police Force on April 16, 1956 can you tell me what rank you held at that time?

"Answer: I went in as a probationary patrolman.

"Question: Well, was there any period of training preceding April 16, 1956 in connection with your application for employment with the Police Department?

"Answer: No, sir.

"Question: Did you have any period of training after April 16, 1956?

"Answer: Yes, sir.

"Question: Can you tell me where that training

took place?

"Answer: Police Headquarters, Mineola, New York.

"Question: For what period of time did you train in the Police Headquarters?

"Answer: I'm not sure what your question refers to, sir.

"Question: Well, you testified that after April 16, 1956 you underwent training in Police Headquarters in Mineola; is that correct?

"Answer: That's correct, sir.

"Question: And my question is for what period of time you received training at the Police Headquarters in Mineola?"

MR. GARDNER: I don't think we need any colloquy between lawyers.

MR. WEITZ: Defendant's lawyer asked -- skip to the next question.

"Question: Now, did there come a time when you filed an application for employment as a policeman with the County of Nassau?

"Answer: Yes, sir.

"Question: Can you tell me when that was with reference to the April 16, 1956 date?

"Answer: Approximately a year previous to that.

"Question: And can you tell me where you filed the application?

"Answer: Nassau County Civil Service, Mineola.

"Question: And following the filing of that application did you receive any response from the Nassau County Civil Service?

"Answer: Yes, sir.

"Question: What was the form of a response that you received?

"Answer: They notified of the time to take the entrance exams. Then you take the physical examinations and the results of my standings on my examinations.

"Question: Well, did there come a time that you took a written examination and a physical examination after you filed the application?

"Answer: Yes, sir.

"Question: Can you tell me when that was with reference to the April 16, 1956 date?

"Answer: No, sir.

"Question: Can you tell me when it was with respect to the date you filed the application, approximately?

"Answer: I don't know the specific dates, sir, I'm sorry.

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MR. GARDNER: I object to the next question, your Honor, there is no response to it.

MR. WEITZ: I am not going to read a question to which there is no response.

Your Honor, may I just continue reading this deposition and put Mr. Fain on the stand?

THE COURT: Do you object to it?

MR. GARDNER: Yes, your Honor.

THE COURT: Sustained. Proceed with your reading.

MR. GARDNER: If your Honor pleases, I thought you excluded witnesses.

THE COURT: You want them excluded?

MR. GARDNER: Certainly, Judge.

THE COURT: Will you wait outside, Mr. Fain.

MR. WEITZ: "Question: Now, did there come a time when your status was changed from probationary patrolman to some other status?

"Answer: Yes, sir.

"Question: And when was that?

"Answer: Six months after my appointment on April 16th. Six months after that, sir.

"Question: What was your status changed to?

"Answer: Patrolman.

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"Question: And did you continue in that rank as a patrolman until you became a sergeant?

"Answer: Yes, sir.

"Question: When did you become a sergeant?

"Answer: April, 1972."

MR. WEITZ: If your Honor pleases, I think that might be the administrator who is a party. However, I don't know if the young girl with him is his daughter. If it is, she might be a witness or may I inquire as to who they are?

Are you Mr. Haber, and is that your daughter?

MR. HABER: Yes.

MR. WEITZ: "Question: Well, do you know approximately how many physical examinations you had?

"Answer: Approximately?

"Question: Can you tell me?

"Answer: Approximately six that I recall.

"Question: On these six examinations, on the occasions of each of them, were you examined by one doctor or more than one doctor?

"Answer: More than one doctor, sir."

MR. WEITZ: Go to line 15.

"Were you informed --

MR. GARDNER: I object to the form of that

question. If your Honor pleases, it assumes something in the question, your Honor.

THE COURT: Yes. I'll sustain it.

MR. WEITZ: I tender question 20. Is it the same objection; same ruling?

MR. GARDNER: There is no time limit in that.

THE COURT: No, I'll allow it.

MR. WEITZ: "Question: Had you on your own, outside of your examinations on behalf of the County of Nassau, ever consulted a psychiatrist?

"Answer: During my entire lifetime, sir?

"Question: That's correct, sir.

"MR. MC DONOUGH: I'll object to entire lifetime. You can askany questions up until September 1972.

"MR. FRIEDBERG: I'm assuming that that's the question.

"Question: Up till September 29, 1972?

"Answer: No, sir.

"Question: Did you take a written examination for the position of sergeant?

"Answer: Yes, sir."

THE COURT: Where are you reading?

MR. WEITZ: There was an objection to the other question. There is no answer so I'm continuing

with the other question.

THE COURT: Line 25?

MR. WEITZ: Yes, sir.

THE COURT: Go ahead.

MR. WEITZ: I'm now on page 14, line 6, your Honor.

THE COURT: "Yes, sir, I did." That is supposed to answer the question?

MR. WEITZ: Page 14, line 6.

"Question: Can you tell me what courses or training you received?

"Answer: I took the promotional examination course given by Delehanty.

"Question: Can you tell me when that was, approximately?

"Answer: No. I don't recall the date, sir.

"Question: Did you have any other courses other than the one you described at Delehanty?

"Answer: Yes. I took a number of Police Science courses at Nassau Community College. Psychology. I also took approximately six other police courses in the Police Science program at the Community College. I also received intermediate training at Police Headquarters on two or three occasions to upgrade me in my performance and knowledge of my profession.

That's about all I can recall at this time, sir.

"Question: Can you give me the approximate dates or times when you took these courses?

"Answer: In approximately the two and one half year period prior to September '72. From about 1970 on. Approximately.

"Question: Can you tell me which one of those courses was the last one preceding September 29, 1972?

"Answer: No, sir. I don't recall the last course I took. I also took a course at the Police Headquarters for supervisory training right after my appointment to the rank of sergeant.

"Question: Was that after you became a sergeant?

"Answer: Yes, sir.

"Question: Was that some time in April 1972?

"Answer: April or the beginning of May.

"Question: Can you tell me what that course consisted of?

"Answer: Responsibilities and duties of a sergeant, of a superior officer. Refreshing on the laws, the penal law, the law to arrest, the practices and procedures of performing my duties as a sergeant.

"Question: How long did that course last?

"Answer: I believe that was a two-week course, sir.

"Question: Was it given by instructors of the Police Department?

"Answer: Both the Police Department and outside instructors, sir.

"Question: Did you receive any course materials? By that I mean written materials?

"Answer: Yes, sir.

"Question: Do you recall or can you describe the written course materials you received?

"MR. MC DONOUGH: Are you referring to textbooks?

"Question: Textbooks, the names or authors?

"Answer: No, sir.

"Question: Was that the last course you received prior to September 29, 1972?

"Answer: It may have been, sir. I'm not sure.

"Question: Did you, prior to September 29, 1972, receive any training by the Nassau County Police Department in any judo or self-defense techniques?

"Answer: Yes, sir, I did.

"Question: When did you receive that training?

"Answer: Yes, sir, I did.

"Question: When did you receive that training?

"Answer: That was given during my probationary period. 1956.

"Question: Was that given by an instructor of the Police Department, if you know?

"Answer: Yes, sir. It was.

"Question: What was the length of that training?

"Answer: I don't recall the length of it, sir."

MR. WEITZ: Objection to that question, Judge? Continuing with the next question, Judge, page 17, line 22.

"Question: Now, on September 29, 1972 was your rank at that time still sergeant?

"Answer: Yes, sir. It was.

"Question: And were you on that day employed by the Nassau County Police Department?

"Answer: Yes, sir. I was.

"Question: And do you recall what your hours of duty were on that day?

"Answer: Yes, sir.

"Question: What were they?

"Answer: 3:00 p.m. till 11:00 p.m. or the completion of the traffic detail at the Coliseum."

MR. GARDNER: Going to page 19, line 12.

MR. WEITZ: "Question: Can you tell me whether

that tour of duty from 3:00 to 11:00 p.m. covered any specific geographic area?

"MR. MC DONOUGH: At what time? On the day in question?

"MR. FRIEDBERG: Yes.

"MR. MC DONOUGH: Referring now to September 29, 1972.

"Answer: Yes, sir.

"Question: Can you tell me what area?

"Answer: The County of Nassau, sir.

"Question: Can you tell me, generally, what your duties were on the 3:00 t4 11:00 p.m. shift?

"Answer: My normal duties on that day was the duty of patrol supervisor to supervise the patrolmen assigned work withinthe County of Nassau and in the evening I was given an assignment to supervise the parking detail in the vicinity of the Nassau County Coliseum.

"Question: Now, will you tell me by whom you were assigned with respect to the supervision of the parking detail?

"Answer: This is assigned through the patrol office.

"Question: Will you tell me how that assignment

is relayed to you, whether it's by phone or a written memorandum of some kind? How you are informed with respect to this detail.

"Answer: Normal method of informing would be through the roll call which is posted at the Highway Patrol desk during each tour of duty.

"Question: Where was that highway patrol desk located?

"Answer: Police Headquarters, Mineola.

"Question: Did you report to the Police Headquarters, Mineola at or about 3:00 p.m. on that day?

"Answer: No, sir. I did not.

"Question: I'm just trying to get the procedure here clarified with respect to what procedure is followed in your reporting for duty, where you report to and what assignments you receive -- on this specific day.

"Will you tell me when you first came on duty at or around 3:00 p.m., where did you report to?

"Answer: I reported to the Police Building in Mitchell Field.

"MR. MC DONOUGH: At what time, approximately?

"THE WITNESS: Approximately 2:30 p.m.

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"Question: And by that do you mean, sir, you were physically present at Mitchell Field at 2:30 p.m.?

"Answer: Yes, sir. I do.

"Question: To whom did you report at that time?

"Answer: I reported to the Highway Patrol Desk via telephone.

"Question: Is the highway patrol desk located in some other place other than Mitchell Field?

"Answer: I think the highway patrol desk is located in Police Headquarters in Mineola.

"Question: So I take it around 2:30 when you reported to Mitchell Field you made a telephone call to Mineola?

"Answer: That's right.

"Question: Was it at that time around 2:30 when you made a telephone call that you ascertained the duty with respect to the parking area?

"Answer: That is correct, sir.

"Question: Was that read to you over the phone?

"Answer: It was conveyed to me over the phone. I don't know whether the man at the other end was reading it or whether he knew it from his own knowldge.

"Question: Can you tell me what the detail was that was conveyed to you? As to what you were required

to do?

"MR. MC DONOUGH: You may answer if you can.

"Answer: I don't understand your question. Would you repeat it?

"Question: What did you interpret the direction to be with respect to the detail in the vicinity of Nassau County Coliseum?

"Answer: I interpreted it to be the supervision of the patrolmen assigned to traffic in the Coliseum area.

"Question: Had you previously received a similar detail?

"Answer: Yes, sir.

"Question: And di you know, on September 29, 1972, at about 2:30 p.m., how many patrolmen were assigned to traffic?

"Answer: Yes, sir, I did.

"Question: How many?

"Answer: I can only estimate. I don't recall exactly, sir. Approximately 13 or 14.

"Question: Did there come a time that you arrived at the Nassau County Coliseum Parking Lot that day?

"Answer: Yes, sir.

"Question: What time was that?

"Answer: Approximately 7:00 p.m.

"Question: Did you arrive a police car?

"Answer: Yes, sir.

"Question: Was anybody with you at the time in the police car?

"Answer: No, sir.

"Question: And did you know at around 7:00 p.m. what event was scheduled for the Nassau County Coliseum?

"Answer: Yes, sir, I did.

"Question: What was your knowledge with respect to that event?

"Answer: That there was going to be a rock concert.

"Question: And did you know what time that concert was scheduled to commence?

"Answer: It was indicated to me at the time. I don't recall what the time was now, sir.

"Question: When you say it was indicated to you are you referring now to the telephone call you made from Mitchell Field?

"Answer: To the telephone call and to the roll call which I have given to me at the start of my tour

of duty.

"Question: Where was that roll call?

"Answer: I had it with me in the patrol car.

"Question: Can you describe in lay terms what a roll call is?

"Answer: It's a list of highway patrolmen members who are working that tour of duty, the course that they are assigned to or the posts that they are assigned to control, the details that are particular to that particular tour of duty, the supervisors that are working through the Highway Patrol Office, members on sick leave, members on vacations, members on days off, those individual members assigned to special details.

"Question: Was this a document that was given to you that day?

"Answer: Yes, sir.

"Question: By whom?

"Answer: It is left in the sergeant's box, the place where I report for duty, sir.

"Question: That's Mitchell Field; is that correct?

"Answer: That's Mitchell Field.

"Question: After you receive this roll call does there come a time when in the performance of your

duty, you are required to return it to the Nassau County Police Department?

"Answer: No, sir.

"Question: What disposition is made of that roll call?

"Answer: At the end of the tour of duty, it is destroyed, sir.

"Question: Do you know if copies are kept of that roll call for that day?

"Answer: I do not know, sir.

"Question: Do you have any present recollection of the substance of that roll call with respect to the concert at the Nassau County Coliseum?

"Answer: I don't understand your question, sir. I'm sorry.

"Question: Did it have any specific instructions to you, sir, with respect to what your duties were to be at that concert?

"Answer: No, sir.

"Question: Now, do you recall what day of the week this was, September 29, 1972?

"Answer: Friday, sir.

"Question: Do you recall where you had been just prior to arriving at around 2:30 at Mitchell Field?

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"Answer: Yes, sir.

"Question: Will you tell me where you had been?

"Answer: Home.

"Question: Now, when you left home to go to Mitchell Field, were you in uniform?

"Answer: Yes, sir. I was.

"Question: Will you describe the uniforms that you had on?

"Answer: Uniform trousers. Black shoes. Black socks. Dark blue shirt. Light blue tie. Dark blue jacket. Blue uniform cap.

"Question: Do you wear a badge?

"Answer: Yes,sir, I do.

"Question: Is that affixed to the shirt?

"Answer: It's affixed to the outermost garment worn, sir. In this case it would be the blouse.

"Question: When you left home that day were you carrying any firearm?

"Answer: Yes, sir, I was.

"Question: Can you describe it?

"Answer: .38 caliber special Colt trooper revolver.

"Question: Was this a revolver that was issued to you by the Nassau County Police Department?

"Answer: No, sir. It was not.

"Question: Can you tell me who issued it to you?

"Answer: No one issued it to me, sir.

"Question: Is this a revolver that you purchased?

"Answer: Yes, sir. It is.

"Question: When did you purchase it?

"Answer: April of 1956 when I was appointed to the Police Department.

"Question: And did you have a holster where you regularly kept that revolver when it was not in use?

"Answer: Did I have a holster that I regularly kept the revolver in? Yes, sir.

"Question: Were you wearing that holster on September 29, 1972?

"Answer: At what time, sir?

"Question: When you left home.

"Answer: Yes, sir.

"Question: Did you have any custom or practice as to where you wore that holster? On what part of your body?

"Answer: Yes, sir.

"Question: Where was that?

"Answer: The holster is worn on my right side, affixed to the belt, around my waist.

"Question: Are you right-handed, sir?

"Answer: Yes, sir, I am.

"Question: Is the revolver that you described as regulation revolver approved by the Nassau County Police Department for use by patrolmen or sergeants?

"Answer: Yes, sir.

"Question: And did you have any custom or practice at that time, back in 1972, with reference to the cleaning of that revolver.

"Answer: If I had a practice or custom? Yes, sir.

"Question: What was your practice and custom?

"Answer: My practice and custom was to keep it clean and in working order.

"Question: Well, did you clean it on a daily basis, weekly basis, monthly basis? Can you describe the custom that you followed with respect to cleaning the revolver?

"Answer: I inspected my weapon daily and when I felt it was in need of cleaning, I would clean it, sir.

"Question: Do I take it then that you inspected the revolver on September 29, 1972, some time prior to 11:30 p.m.?

"Answer: Yes, sir.

"Question: And as a result of that inspection did you observe any defects in the revolver at the time you inspected it?

"Answer: No, sir.

"Question: As far as your knowledge is concerned, was the revolver on that day in good working order?

"Answer: Yes, sir.

"Question: Now, when you arrived at the Nassau County Coliseum at around 7:00 p.m., did you have any bullets loaded in the revolver at that time?

"Answer: Yes, sir.

"Question: How many?

"Answer: Six, sir.

"Question: Is that the total capacity of the revolver?

"Yes, sir, it is.

"Question: When was it, if you can recall, when you had loaded the six bullets into the revolver?

"Answer: It would be before I left work, sir.

"Question: The same day?

"Answer: The same day, sir.

"Question: Now, can you tell me what training you had received in the firing of a revolver?

"Answer: I received basic instructions during my probationary period when I was first appointed to the Police Department. I then received periodic instruction throughout my career in the Police Department given by the Police Department at their range.

"Question: Do you recall when was the last time prior to September 29, 1972, that you had fired that revolver on the range?

"Answer: No, sir. I do not.

"Question: Well, is it your best recollection that it was that year or the preceding year?

"Answer: I do not know, sir. I do not recall.

"Question: Did that revolver have a safety catch?

"Answer: No, sir.

"Question: Can you tell me what the procedures were, step by step, in firing a revolver of this type?

"Answer: What is the procedure?

"MR. MC DONOUGH: Mechanically, how long would firing a Colt 38 Special Trooper Revolver take if one had it in his hand? Is that what you mean?

"MR. FRIEDBERG: Yes.

"Answer: The weapon is drawn from the holster from which it is usually carried. It is pointed at

the target for which it is intended to be shot. The trigger is pulled in a rearward motion and as the handle is brought back it is finally released and goes forth, striking the primer of the cartridge which, in turn, ignites the propellant powder. The burning powder would, in turn, create gas pressure which transfer the projectile from the cartridge down the barrel and to the target.

"Question: Now, when you did have your range-finding sessions, were records kept of your firing at those sessions?

"Answer: I do not know the procedures as far as the record keeping, sir.

"Question: When you arrived at the Coliseum around 7:00 p.m., can you tell me what area you first arrived at?

"Answer: No, sir. I cannot.

"Question: Well, are there parking lots in the vicinity of the Nassau County Coliseum?

"Answer: Yes, sir. There are."

"Question: Do you know how many parking lots there are surrounding the Coliseum?

"Answer: No, sir. I do not know the number. They completely surround the whole Coliseum. They are on all four sides.

"Question: And do I take it that your assignment for that evening, with respect to the Nassau Coliseum detail, involved the entire parking area and traffic detail surrounding the Nassau County Coliseum?

"Answer: That is correct, sir.

"Question: Can you tell me what you did when you first arrived at 7:00 p.m.?

"Answer: I gave the traffic details to the patrolmen assigned. I made sure the traffic cones were sent out to the locations. I instructed the patrolmen to set the traffic lights for the incoming traffic and I then checked to make sure that each traffic post was covered. That's it.

"Question: Now, the patrolmen who were assigned to the traffic detail on that night, were they also assigned to posts on the parking lots immediately adjacent to the Coliseum?

"Answer: Some men were assigned to control the traffic lights entering the roadways that surround the Coliseum. Others were assigned to traffic duty in the roadway, directing the traffic. Others were assigned to check on parking conditions. Others were assigned to patrol the immediate parking fields.

"Question: Do you know how many were assigned

to check on the parking conditions?

"Answer: I believe that night there were two cars assigned to traffic parking conditions.

"Question: And how many were assigned with respect to the parking fields?

"Answer: I don't recall the exact breakdown.

"Question: Well, can you give me the total number of men in the details that you referred to?

"Answer: I believe there were approximately 13 or 14.

"Question: Well, of those, can you recall now how many were assigned to duty with respect to traffic and traffic lights outside the parking fields?

"Answer: I could only estimate. I don't know, sir.

"Question: What's your best estimate?

"Answer: Approximately eight or nine were on the actual traffic duty.

"Question: And to clarify that now, you are talking about traffic outside of the traffic on the parking fields?

"Answer: I'm talking of those assigned to the traffic entering the parking fields.

"Question: As distinguished from traffic

inside the parking fields?

"Answer; All right, sir.

"Question: Do you recall the names of the patrolmen who were assigned to check the parking conditions in the parking fields on that evening?

"Answer: No, I do not, sir.

"Question: Now, did all of the patrolmen who were assigned to the parking fields to check the fields and the conditions on that evening, did they have patrol cars assigned to them or were they foot patrolmen?

"Answer: They had cars assigned to them, sir.

"Question: And after giving the instructions that you testified to regarding the traffic details and checking the parking fields and conditions, did you remain in the vicinity of the Nassau Coliseum or did you leave?

"MR. MC DONOUGH: Between 7:00 and 11:00?

"MR. FRIEDBERG: Between 7:00 and 11:00 p.m.,

"Answer: I was in the vicinity.

"Question: And were you continuously in the vicinity from around 7:00 o'clock until about 11:00 or 11:30?

"Answer: Yes, sir.

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"Question: And when you say in the vicinity, can you tell me specifically where you were in the vicinity with relationship to the Nassau Coliseum?

"MR. MC DONOUGH: By that you mean the boundaries?

"MR. FRIEDBERG: Yes.

"Answer: I was mostly within the Mitchell Field complex.

"Question: Can you describe what the relationship is between Mitchell Field complex and the Nassau County Coliseum?

"Answer: The Mitchell Field complex was the area owned by the Federal Government and since then has been redivided into property that is under the Navy Department, some under the Department, some under the town. It has been broken up. Some the Government gave up. Mitchell Field is that area that was formerly a part of Mitchell Field. The Coliseum is part of this complex. It's an area within the Mitchell Field complex.

"Question: Do I take it that the Mitchell Field complex includes Mitchell Field that you previously testified to as the field to which you reported around 2:30?

"Answer: That's right, sir.

"Question: Now, during the time that you were in the vicinity of the Coliseum between 7:00 p.m. and 11:00 or 11:30 p.m., were you in your car?

"Answer: Yes, sir.

"Question: For all of that time?

"Answer: No, sir.

"Question: Can you tell me what time approximately you got out of your car after 7:00 p.m. for the first time?

"Answer: No, sir. There's no way of -- I don't recall.

"Question: Well, did there come a time when you drove to one of the parking fields of the Nassau County Coliseum that evening after 7:00 p.m.?

"Answer: Yes, sir.

"Question: About what time was that?

"Answer: I drove to the parking field on numerous occasions, sir.

"Question: And those occasions were between 7:00 p.m. and 11:00 or 11:30 p.m.?

"Answer: Yes, sir.

"Question: Had you been informed previously or did you know previously at approximately what time

the concert was expected to end?

"Answer: I have known from previous concerts they have had there approximately the time it would end. Yes, sir.

"Question: And what time was that?

"Answer: It was estimated between 11:00 and 11:30.

"Question: I'm trying to pinpoint the time, approximately at what time, you arrived at the parking field or any of the parking fields on the last occasion prior to 11:00 or 11:30 p.m.

"MR. MC DONOUGH: In other words, before the incident in relation to George Haber. Is that what you're talking about?

"MR. FRIEDBERG: Yes.

"MR. MC DONOUGH: When was the time before that you were in the parking area?

"THE WITNESS: I could only estimate the time as somewhere in the vicinity of 10:15 and 10:30.

"Question: Can you tell me what you did in that interval between 10:15 and 10:30?

"Answer: I patrolled through the parking area in the vicinity of the entrances and exits to attempt to ascertain if people were starting to leave, if the

patrolmen assigned were at their assigned positions or in the vicinity of their patrol areas, attempted to find if there were any parking conditions that needed correction.

"Question: Now, was there a designation by number or other way of the patrol posts within the parking fields?

"Answer: I don't know what you mean, sir. I'm sorry.

"Question: Were there posts assigned to the patrolmen within the parking area?

"Answer: Yes, sir.

"Question: Did those posts have any names or code or number?

"Answer: I don't recall what the designation was for them, sir.

"Question: Well, had you assigned them any special or specific posts within that parking area?

"Answer: I assigned the patrol within the parking field, sir. I did not designate a particular area for them to patrol.

"Question: Was it your instructions to them to roam through the parking area?

"Yes, sir.

"Question: So they did not have any specific area to patrol in any specific time?

"Answer: Just the parking area but no particular area in the parking fields. No, sir.

"Question: Was your vehicle -- I'm talking about the police car to which you were assigned -- did it have a radio?

"Answer: Yes, sir. It did.

"Question: In the interval between 10:15 and 10:30 had you received any communication on that radio relative to any of the traffic or parking conditions within the parking fields surrounding Nassau County Coliseum?

"Answer: Not that I recall, sir.

"Question: And in that interval between 10:15 and 10:30 did you ascertain if any people were leaving the concert at that time?

"Answer: Yes, sir. I did.

"Question: Were people leaving there between 10:15 and 10:30 from the Coliseum?

"Answer: Yes, sir. They were.

"Question: What, if anything, did you do with respect to the people who were leaving the Coliseum in that interval?

"Answer: I did nothing but observe them, sir.

"Question: Can you recall now the number of people you observed leaving in that interval?

"Answer: No, sir.

"Question: When you say you observed them do you mean from inside your vehicle or outside your vehicle?

"Answer: From inside, sir.

"Question: In that interval between 10:15 and 10:30, did you approach any of these people that were leaving?

"MR. MC DONOUGH: By that do you mean physically, himself, go up to them?

"MR. FRIEDBERG: Yes.

"Answer: No, sir.

"Question: Did you have any conversations with any of the people who were leaving in this interval?

"Answer: No, sir.

"Question: Now, will you tell me where you were following this interval at about 10:30 in terms of your location between 10:30 and 11:00 o'clock?

"MR. MC DONOUGH: Before he returned to the parking area?

"Answer: Patrolling the immediate vicinity of

the Mitchell Field complex.

"Question: And when was it next that you returned to the parking fields subsequent to that time?

"Answer: Approximately 11:00 p.m.

"Question: And at about 11:00 p.m. or just prior thereto had you received any communication on the vehicle radio with respect to any conditions in the parking fields?

"Answer: No, sir. Not that I recall.

"Question: And at about 11:00 p.m., can you tell me when you arrived in the parking fields whether you brought your vehicle to a stop at any particular location?

"Answer: Yes, sir.

"Question: Can you tell me what that location was?

"Answer: I stopped in the parking field just northeast of the Coliseum.

"Question: Were there cars parked in the parking field other than your own?

"Answer: Oh, yes.

"Question: Do you know what the capacity of that parking field is?

"Answer: No, sir.

"Question: Can you estimate how many cars were parked at that time around 11:00 p.m. in the northeast field?

"Answer: No, sir.

"Question: Do you have any other designation that you know of referring to the parking field northeast of the Coliseum?

"Answer: No, sir.

"Question: Now, at that time, at around 11:00 p.m., did you see any of the patrolmen on duty within the parking area at that time?

"Answer: Yes, sir.

"Question: Can you tell me whom you saw at that time?

"Answer: I don't recall the officer's name.

"Question: Well, was it one officer or more than one officer that you saw at around 11:00 p.m.?

"Answer: I saw one officer.

"Question: And was that one officer one of the officers you had seen previously the same evening?

"Answer: Yes, sir.

"Question: Did you have a conversation with that officer at that time?

"Answer: Yes, sir. I did.

"Question: Can you tell me what the substance of the conversation was?

"Answer: The substance was I had informed him that the traffic would be beginning to pick up, that the concert would probably be breaking very soon, to keep himself aware of the situation and to inform any of the other officers that he saw while on patrol that we expected the concert to be breaking at any time and when it did everyone was to get out to their traffic posts.

"Question: Now, with respect to that particular officer, did he have a traffic post other than the post inside the parking field for that evening?

"Answer: I do not know, sir.

"Question: Well, when you told him to report to his traffic post after the concert ended, did you mean by that some post other than the post in which he was then at the time of the discussions?

"Answer: I informed him to tell any other officer that he saw that if they were assigned to a traffic post to be out there when the concert broke.

"Question: You are referring to a post. You mean outside the parking fields?

"Answer: At the entrances and exits to the

parking fields, yes, sir.

"Question: Did you make a determination at some time after your conversation with the officer that the concert had, in fact, come to an end?

"Answer: No, sir.

"Question: Can you tell me what observation you made at 11:00 p.m. with respect to the number of people who were leaving the Coliseum at that time?

"Answer: I observed that there was a number of people leaving, much smaller than the normal flow at the end of a concert or a performance.

"Question: And, based upon that observation, did you conclude that the concert had not yet terminated at the time you made that observation?

"Answer: That, and I could hear the sound coming from the Coliseum.

"Question: Now, at that time, at around 11:00 p.m., after your conversation with the officer whose name you don't recall, did you remain in the parking field for some period of time?

"Answer: Yes, sir.

"Question: For what period of time did you remain in the parking field up until something happened?

"Answer: Up until something happened? Five minutes. Approximately five minutes.

"Question: When you had your conversation with the officer around 11:00 p.m., were you in the car, in your car, when you had that conversation?

"Answer: Yes, sir. I was.

"Question: Did you remain in your car for the next five minutes?

"Answer: Yes, sir.

"Question: As you were sitting in the car during those five minutes, did you have a view of the Coliseum itself?

"Answer: The exterior of it. Yes, sir.

"Question: Did you have a view of any of the entrances or exits?

"MR. MC DONOUGH: You mean of the Coliseum?

"Question: Of the Coliseum.

"Answer: From time to time. Yes, sir.

"Question: And during that five minutes did you have any conversations with anyone other than the officer that you have already testified to?

"Answer: I had a conversation with two young ladies that flagged me down or young girls that flagged me down.

"Question: You mean your car was in motion at that time?

"Answer: Yes, sir. It was.

"Question: Do I take it then that after your conversation with the officer around 11:00 o'clock, you began driving your car in the parking area?

"Answer: That's correct, sir.

"Question: As a result of the flagging down, did you stop your car?

"Answer: I did, sir.

"Question: Did you remain in the car or did you get out?

"Answer: At first I remained in the car. Then I got out there.

"Question: While you were in the car, before getting out, did you have any conversation at that time?

"Answer: Yes, sir. I did.

"Question: Was it with one or two of the girls?

"Answer: Both girls, sir.

"Question: For the purpose of clarification, can you describe one of the girls or both of them?

"Answer: Just the fact that they were young, possibly less than 20. Nicely dressed. That's about all I could describe of them.

"Question: Did you subsequently learn the names of those girls?

"Answer: No, sir, I didn't."

MR. WEITZ: If your Honor pleases, if I am not bound by the next answer I will read it. If the Court rules I am not bound, I will read it.

THE COURT: The general rule is that if you read something into your case you've adopted it.

MR. WEITZ: Even if it's the defendant's words I'm reading?

THE COURT: It's up to you.

MR. WEITZ: Then I will not read it.

THE COURT: With respect to the reading of testimony, if you had a witness himself on the stand it would be something different. But, I think the rules still apply as to the reading of testimony.

MR. WEITZ: It's different here?

THE COURT: I think the rule still applies to the reading of testimony. I think it's different if there is a witness on the stand, under the new rules.

MR. WEITZ: I'll not read it.

MR. GARDNER: I'll take a posture.

THE COURT: After he's finished, you can read. It will be in your case.

MR. WEITZ: I am now going then to page 51, line 3.

"Question: Is it your recollection that the conversation related to an attempt to grab one of them as distinguished from both of them?

"Answer: That is the impression that was conveyed by the girls, yes.

"Question: Did you make any responses to that conversation?

"Answer: Yes, sir.

"Question: What responses did you make?

"Answer: I asked the girls where the man was.

"Question: Incidentally, at that time of that conversation with the two girls, prior to your asking where the man was, did they identify the man in any way?

"Answer: No, sir.

"Question: And did they tell you where the man was?

"Answer: Yes, sir.

"Question: What did they say?

"Answer: They pointed in a northerly direction and said he was about three aisles over.

"Question: And by that did you understand them to mean aisles of cars?

"Answer: Aisles of cars. Yes, sir.

"Question: Were there any other discussions after they pointed in a northerly direction, between you and any of these two girls?

"Answer: Yes, sir.

"Question: When was that?

"Answer: When they pointed in the direction, I got out of the car at that point, and I looked in the direction in which they were pointing.

"Question: And then what did you do?

"Answer: I then told the girls to follow me.

"Question: And by that did you mean on foot or by car?

"Answer: I meant on foot, because that's the way they were, sir.

"Question: So that we have this clear, when you told the girls to follow you did you intend the girls to follow you on foot by their walking?

"Answer: I didn't intend that they follow in any particular method. I just told them to follow me.

"Question: Was it your intention to proceed on foot to the place where they had pointed?

"Answer: No, sir.

"Question: Did you then get back into your car?

"Answer: I did, sir.

"Question: Now, at that point, in the parking field where this discussion took place, and prior to your getting back into your car, did you observe any patrolmen in the immediate vicinity?

"Answer: No, sir.

"Question: And then did you proceed to drive your car in the area where they had pointed to?

"Answer: Yes, sir.

"Question: And did you proceed to three aisles over?

"Answer: Yes, sir.

"Question: And did there come a time then that you brought your car to a stop?

"Answer: Yes, sir.

"Question: When you brought your car to a stop, did you get out of your car?

"Answer: Yes, sir.

"Question: Immediately.

"Answer: Yes, sir.

"Question: Prior to getting out of your car, at that time, did you observe any patrolmen in the vicinity of the place where your car was stopped at that time?

"Answer: No, sir.

"Question: And prior to your getting out of your car, at that time, did you make any calls on your radio?

"Answer: No, sir.

"Question: Were your lights on? By that I mean your headlights?

"Answer: Yes, sir.

"Question: Did you have your blouse on at that time?

"Answer: Yes, sir.

"Question: Were you wearing your gun and holster?

"Answer: Yes, sir.

"Question: Were your gun and holster underneath your blouse?

"Answer: Yes, sir.

"Question: When you got out of your car, at that time when you were three aisles over, was your blouse buttoned?

"Answer: I don't recall, sir.

"Question: Now, when you reached the point three aisles over did you turn into an aisle or did you just park adjacent to the aisle?

"Answer: No. I turned into the aisle, yes, sir.

"Question: Did you proceed some distance into

the aisle before you came to a stop?

"Answer: Yes, sir. I did.

"Question: How many feet?

"Answer: I could not tell you.

"Question: Prior to coming to a stop, while you were proceeding in that aisle, did you observe anyone in that aisle?

"Answer: Yes, sir. I did.

"Question: And at what distance from your car was that individual when you first observed him?

"MR. MC DONOUGH: As he was in the aisle?

"Answer: As I turned into the aisle, approximately 300 feet.

"Question: What's the width of the aisle at that point where you turned into the aisle; can you tell me?

"Answer: I can only estimate.

"Question: What's your best estimate?

"Answer: I don't know exactly. Fifteen feet.

"Question: What's the distance of the aisle from the point where you turned in to where it comes to a stop or where you physically can no longer park up the end of the aisle?

"Answer: I would estimate a couple of

thousand feet.

"Question: When you first turned into the aisle, for the distance that visibility was possible that evening, can you tell me how many persons you observed in that aisle from the moment you first entered into it?

"Answer: Just one.

"Question: When you first turned into the aisle and observed this one person can you tell me what observation you made with respect to what this person was doing at that time?

"Answer: He was walking in an easterly direction.

"Question: Would that be towards your car or away from your car?

"Answer: Away from my car, sir.

"Question: And at that time when you first turned into the aisle did you make any other observations with respect to this person other than the distance he was from your car?

"MR. MC DONOUGH: And the fact he was walking.

"Question: And the fact he was walking.

"Answer: No, sir. I observed that he was a male.

"Question: And at that time his back was

towards you, I take it; is that correct?

"Answer: Yes, sir.

"Question: Now, can you tell me what, if anything, you did after turning into the aisle and after making this observation of this individual 300 feet away from you?

"Answer: I proceeded eastbound in the aisle. Stopped the car to the rear of the individual. I opened the door on the driver's side after putting the car in park. I got out of the car. I called to the individual. I told him to stop, and identified myself as a police officer. The individual continued to walk. He appeared even not to pay attention to me or not hear me. I again called to him, told him to stop, again I identified myself as a police officer. He continued to walk. I started after him.

"Question: Now, at this point when you stopped your car to the rear of the individual, as you have just testified to, did you make any observations at that time as to where the two girls were that you had the previous discussion with?

"Answer: No, sir, I did not.

"Question: Now, after bringing your car to a stop at the rear of this individual, as you have

testified to, and when you opened the door on the driver's side and got out, at that point, did you make any observations with respect to the two girls whom you previously had talked to?

"Answer: No, sir. I did not.

"Question: Did you look to your rear, that is, in a westerly direction, after you got out of your car while you were in the aisle at the point where you opened the door on the driver's side?

"Answer: I looked just for the purpose of ascertaining there was no traffic coming behind me which would be unsafe to open the door. That's all.

"Question: When you made that observation with respect to traffic behind you were you looking in a westerly direct6on?

"Answer: It would be westerly. Yes, sir.

"Question: And at that time what was the distance of your car from the entrance to the aisle that you had just come to?

"Answer: Again, it would have to be an estimate. I would say 320-330 feet.

"Question: And in that distance of 320 feet approximately, when you were walking in a westerly direction, did you observe any of the two girls that

you had previously talked to?

"Answer: No, sir. I did not.

"Question: Now, when you stopped your car in the aisle what was the distance between your vehicle and the rear of the individual?

"Answer: Six to eight feet.

"Question: And at that time would his back still be towards you?

"Answer: Yes, sir. It was.

"Question: Were your lights on?

"Answer: Yes, sir. They were.

"Question: Prior to getting out of the car on the driver's side, did you blow your horn?

"Answer: No, sir.

"Question: At the time that you opened the door on the driver's side, while you were in the aisle, were there any other individuals in that aisle other than the individual you observed when you first came into the aisle?

"Answer: When is this, sir?

I observed no one other than the original individual.

"Question: And in that distance of six to eight feet in which the individual was in front of

your car, when you came to a stop, did you make any observations and draw any conclusions with respect to the age of the individual at that time?

"Answer: Just that he appeared to be young. In the vicinity of about 20 years, I assumed.

"Question: Now, when you identified yourself to this individual as a policeman the first time can you recall what exactly it was, the language you used?

"Answer: I told the individual to stop. I told him I was a police officer.

"Question: And at that time did you observe what the individual was wearing?

"Answer: The individual had a pair of trousers and a T-shirt on.

"Question: Did you observe whether or not he was wearing a hat?

"Answer: I don't recall him wearing a hat, sir.

"Question: When the conversation with the two girls took place, as you have testified to, did they inform you, at that time, of any description of the clothes the individual was wearing that they were referring to?

"Answer: They just mentioned the T-shirt, sir.

"Question: Did they describe the T-shirt in

any specific detail?

"Answer: Not that I recall, sir.

"Question: Now, at the time that you again identified yourself to the individual and told him to stop, can you tell me what his distance was at that time from the police car?

"Answer: I would estimate 35 feet.

"Question: And at that time what was your distance from the police car?

"Answer: I was standing right next to the police car.

"Question: And did you then leave from the area of the police car and proceed in an easterly direction?

"Answer: Yes, sir. I did.

"Question: And as you proceeded in an easterly direction were you walking or running?

"Answer: I ran, sir.

"Question: And did there come a time when you stopped running?

"Answer: Yes, sir.

"Question: And what was your distance from the police car at the time you stopped running?

"Answer: Again, I would have to estimate, sir.

Approximately 65-70 feet.

"Question: And in that 65 or 70 feet, can you tell me where your gun was?

"Answer: In my holster, sir.

"Question: And can you tell me, in that 65 or 70 feet, where your right hand was.

"Answer: On the right side of my body."

MR. WEITZ: I will skip the next question, your Honor. I don't wish to be bound by it.

"Question: When you stopped running, sir, after 65 or 70 feet, can you tell me where this individual was at that point?

"Answer: Approximately 100 feet in front of the police car.

"Question: And would it be fair to say that he was approximately some 30 feet from you at that point where you stopped running?

"Answer: No. This is where I overtook the individual, when I stopped running.

"Question: And at that point when you say you overtook the individual was he at that point walking, running or standing still?

"Answer: Walking.

"Question: In an easterly direction?

"Answer: Yes, sir.

"Question: When you overtook him did you have any conversation with him at that time?

"Answer: Yes, sir.

"Question: Can you tell me what the conversation was?

"Answer: I told him that I wanted to speak with him; I'd like him to return with me to the patrol car.

"Question: At the time of that conversation, can you tell me what the relative position of your body was with respect to this individual's body in the sense of were you in back of him, in front of him, to one side or the other?

"Answer: I was to the rear but not directly in back of him, but off a little bit and to the rear of him.

"MR. MC DONOUGH: Would that be to the left or to the right?

"THE WITNESS: To the right.

"Question: What distance to the rear were you at that time?

"Answer: Arm's length.

"Question: And what, if anything, did this

individual say to you when you made that statement to him?

"Answer: The individual said nothing.

"Question: Did he keep walking?

"Answer: Yes, sir. He turned around and started walking back to the patrol car with me.

"Question: Now, other than telling him that you wanted him to come back to the patrol car with you, did you say anything else to him prior to the return back to the car?

"Answer: No, sir."

MR. WEITZ: I want the same revision.

THE COURT: No, sir, you're stuck with it. It's your reading.

MR. WEITZ: If your Honor's ruling is allegedly correct I am not stuck with it. If your Honor's ruling is not allegedly correct I want to reserve my rights on that.

THE COURT: You can do that without making specific objections.

MR. WEITZ: At any or a time I wish to make a legal argument, I wanted the record to reflect that.

THE COURT: You read down to line 16, page 65.

"Question: Did he say anything to you prior

to the return back to the car?

"Answer: No, sir.

"Question: As you returned back to the car, were you walking side by side or one in front and one in the back or what was the relative position at that time?

"Answer: We were walking, not side by side. I was slightly behind the individual, on his right-hand side.

"Question: And were you in physical contact with the individual at that time?

"Answer: Yes, sir.

"Question: In what way?

"Answer: I was holding his right arm with my left hand.

"Question: When you placed your left hand on his right arm, did he resist in any way?

"Answer: No way at all, sir.

"Question: Now, as you were walking back towards the police car, with this individual, did you make any observation with respect to whether or not there were any other individuals in that aisle at that time?

"Answer: I don't recall making any observation, sir.

"question: Did you see any patrolmen in the

aisle at that time?

"Answer: No, sir. I saw no patrolmen, sir.

"Question: Tell me what distance you walked with this individual, returning to the patrol car?

"Answer: We walked back to, I would say, within ten feet of the patrol car.

"Question: And that would be ten feet of the front of the patrol car; is that correct?

"Answer: Yes, sir.

"Question: And prior to reaching that point ten feet to the front of the patrol car, had your relative positions changed in any way?

"Answer: No, sir.

"Question: Was your left hand still on his right arm?

"Answer: yes, sir, it was.

"Question: And at that time, prior to reaching the point ten feet in front of your patrol car, where was your right hand?

"Answer: On my side of my body.

"Question: Was any part of your right hand touching the gun or holster at that time?

"Answer: No, sir."

MR. WEITZ: If your Honor please, there is an

answer here that runs some five pages. I would like to read it to myself before I read it aloud. I might have motions addressed to some parts of it.

THE COURT: We're not there at this point unless you are going to read it.

MR. WEITZ: "Question: When you reached the point ten feet in front of the patrol car, did you come to a stop?

"Answer: Yes, sir.

"Question: And at that time did this individual also come to a stop?

"Answer: Yes, sir."

MR. WEITZ: I am now at that answer.

THE COURT: If you want to read it, fine. If you don't want to read it, it's permitted.

MR. WEITZ: I will not read it, Judge. I will move to strike on the grounds --

THE COURT: Don't move to strike. You don't know if anybody else is going to read it.

MR. WEITZ: "Question: Now, from the time that you reached the point ten feet from the front of the car on your return back to the car with the individual up until the time that you heard the gun go off for the last time how much time elapsed in that

interval?

"Answer: I couldn't say exactly but it seemed like an eternity."

MR. WEITZ: I am not going to read that.

MR. GARDNER: I am going to object to reading a partial question.

THE COURT: He's withdrawn the question. You may read that question if you wish to.

MR. WEITZ: Page 73 line 9.

"Question: Do I take it that at that time when you got out of the car to proceed east the keys of the car were still in the ignition; is that correct, sir?

"Answer: Yes, sir, they were.

"Question: Now, will you tell me what hand grasps are?

"Answer: Hand grasps are a composition material that are felt on either side of the part of the gun which fits into the contour of the hand, much the same as the handle would be on a tool or an instrument.

"Question: Is that a metal or wood?

"Answer: They are made of wood, plastic, ivory.

"Question: Do you know how they are secured on the gun?

"Answer: There is a screw that goes between

the two pieces through the butt of the weapon.

"Question: Is it a single screw?

"Answer: Yes, sir.

"Question: Is there a nut or a bolt on one or the other?

"Answer: One side of the hand grasp has a threaded piece that the screw screws into.

"Question: When you had to examine the gun that morning was that screw in place?

"Answer: Yes, sir.

"Question: From your observation that morning was that screw loose in any way?

"Answer: No, sir."

MR. WEITZ: I have nothing else on examination before trial.

THE COURT: We'll take a five-minute recess. Ladies and gentlemen, don't discuss the case.

(Recess.)

THE COURT: Do you wish to read portions? Because we might as well get these rulings out of the way since the jury is not in.

MR. WEITZ: Page 73 line 12. And my question is what period of time had you received training in the Police Department, Mineola, and the answer on

line 18, I believe seventeen weeks.

THE COURT: Yes, you can read that.

MR. GARDNER: I believe on page 50 the question can you tell me what was said to you by one of these girls, or both?

THE COURT: Two girls recited, they were talking simultaneously. They said a man tried to grab one of them and dragged her between the parked cars.

MR. WEITZ: I move to strike the answer. Then I renew the motion. Now, I object to it being read at this time to this jury.

MR. GARDNER: For me, your Honor, it goes directly to what he was told, not necessarily to the truth of the matter contained in terms of his state of mind and reasonableness of --

MR. WEITZ: They can put it in their case. The decedant is not even described. We don't know which one of the girls --

THE COURT: I'll allow it.

MR. GARDNER: Page 60, if your Honor pleases, line 21.

THE COURT: And I'll allow it, in particular since you read the impression that was conveyed to me by the girls on the next page. Since you read an answer

about the impression that was conveyed to him by the girls, I'll allow the balance of the impression that was conveyed to him by the girls.

MR. GARDNER: Page 60, if your Honor pleases, line 21.

Question, conversation with the two girls took place, did they inform you of the clothes the individual was wearing, and the response, T-shirt.

Page 61, line 2, did they describe the T-shirt inany specific detail and the answer is not that I recall.

THE COURT: I'll allow that.

MR. WEITZ: If your Honor please, in view of the fact that we were not permitted to question this officer at this examination before trial, we met with objections when we attempted to find out whether there were other individuals wearing T-shirts.

THE COURT: You should have pressed for a ruling and gotten an answer.

MR. GARDNER: Page 63, if your Honor please, on line 15, just a follow-through with the issue where his hand was.

THE COURT: I'll allow that.

MR. GARDNER: On Page 68 a response to the

question on line 4, the question is did you come to a stop simultaneously and then the question describe what happened and the following answer.

THE COURT: That was not --

MR. WEITZ: That was not our question, Judge. And it's not responsive to the question that was asked.

THE COURT: I don't know how you can say -- you should have stopped him at that point and said no, it's not part of this deposition.

Anything beyond whether they stopped simultaneously is not responsive to the question.

MR. GARDNER: Your Honor will notice on page 74 the adoption of the response by the Plaintiff.

MR. WEITZ: I didn't read any of those questions.

MR. GARDNER: To your Honor's question, the counsel should have stopped the inquiry at that time. If you will note the adoption by Plaintiff's attorney in reference to an attempt to go through a series of questions concerning the question that was responded to, describedwhat happened on page 68 where again on page 74, Mr. Friedberg's response to Mr. McDonough, he is becoming repetitious, he should go through it again, that response it was his narrative. I want to

find certain further things out so my position, your Honor, that that page 68 question and answer which is responsive to what happened described what happened, should be read to the jury in terms of the continuity so they can understand those portions of the break of time that Mr. Weitz has read.

MR. GARDNER: With the Court's permission I would like to read portions of Sergeant Sehlmeyer's deposition that was taken under oath that were not read by Mr. Weitz.

THE COURT: Yes.

MR. GARDNER: Page 77, line 12 the question was omitted. Question, my question is for what period of time did you work in Mineola?

"Answer: May 19, I believe, the course was nineteen weeks. I'm not sure of the exact length of time, sir."

MR. GARDNER: On page 50, the question was not read by Mr. Weitz so the continuity, the conversation was what occurred, that he was flagged down.

MR. WEITZ: I would object to him addressing the jury.

THE COURT: What do you want to read?

MR. GARDNER: Page 50, line 5, that question and

answer that immediately follows, your Honor.

THE COURT: Yes, you may.

MR. GARDNER: Question:Can you tell me what was said to you by one of these girls, or both?

"Answer: The two girls were very excited and they seemed frightened and they both were talking simultaneously. They said some man had just tried to grab one of them and drag her between the parked cars."

MR. GARDNER: On page 80, your Honor, line 21.

"Question: When the conversation with the two girls took place as you have testified to, did they inform you at that time of any description of the clothing the individual was wearing that they were referring to?

"Answer: They just mentioned the T-shirt, sir."

And the following question, your Honor, page 61,

"Question: Did they describe the shirt in any detail?

"Answer: Not that I recall, sir."

MR. GARDNER: Page 68, if your Honor please. Question on line 6, Describe what happened? If your Honor please, continuity, this is at a point --

THE COURT: Read the question before that.

MR. GARDNER: I'll read the question before

that, your Honor. If I may, your Honor, I would like to start page 67, line 15 to get the continuity in which this was read.

"Question: At that time, prior to reaching the point ten feet in front of your patrol car, where was your right hand?

"Answer: On my side of my body.

"Question: Was any part of your right hand touching the gun or holster at that time?

"Answer: No, sir.

"Question: When you reached a point ten feet in front of the patrol car did you come to a stop?

"Answer: Yes, sir.

"Question: At that time did this individual come to a stop?

"Answer: Yes, sir."

MR. GARDNER: And now the following question I want to read that hasn't been read.

"Question: Did you come to a stop simultaneously, or one before the other; describe what happened?

"Answer: As he approached the patrol car the subject suddenly became extremely violent, started hollering and screaming. He spun around. I lost my grasp on him. AS he came around he struck me, hit my

shoulder and onto my head. At this I backed up and started to fall and I fell to the ground and the individual came down on top of me and a scuffle ensued on the ground. We rolled over. The individual attempted to keep assaulting me. I, in turn, struck back at the subject and tried to defend myself.

"We were rolling around on the ground and grappling. I reached into my pocket, took out my jack and struck the individual along the side of the head. Apparently he gave no reaction to even feeling the blow. He reached up, ripped the jack out of my hand, took one swipe at me with it, and what happened after that, I don't know.

"By this time I had gotten to my knees. The individual was behind me with his arms around my body. I attempted to break loose but was unable. There were people in the aisle now and I asked them for assistance to help me subdue the individual. He kept right on, didn't bother to stop. A short time later I recall a car entering the aisle in the west end. It got up abreast of my particular car and stopped. It was occupied by two girls. The couldn't pass us because my car was blocking part of the aisle and the subject and I were on the ground, on the other part.

The subject had suddenly become very docile and very quiet but every time I tried to move I could feel him tensing up and I remained as calm as I could.

I called to the girls in the car that had just stopped. I asked her to go to my patrol car, to use the radio to call for assistance and to turn on the red flashing dome light on top of the car. The girl stated she didn't know how to work the radio, and I told her to take the microphone, to press the switch on it and tell the dispatcher that there was a signal 14 and that I needed assistance in the parking field of the Coliseum. I also told her to please turn on the dome light.

She said she couldn't find the switch. I kept telling her it was on the left-hand side of the dash next to the steering post, but she kept saying she couldn't find it. I told her the white switch which was different than all the other switches. She still wasn't able to find it. She said that whoever was at the radio requested a better location.

I then decided to chance getting up with the individual. I started to my feet. The individual got up very quietly and docilely, along with me. I swung around, got a hammerlock on the individual and we

started towards the patrol car. As we approached the car the individual suddenly became violent again. Again he broke out of my grasp and he ran to the open door of the car. He jumped into the car and started to depress the accelerator, racing the engine. But for some reason he didn't put the car into gear.

"At this point I went to the patrol car, I reached in to take the keys out of the ignition and turn the engine off. As I reached in with my left hand I felt him going for my gun. I immediately went for the gun also. We started grappling. We started fighting. The gun came out of the holster. We were fighting for possession of the gun inside the car. He seemed tobe going for my eyes andmy face. I was hitting him with whatever I could muster, mostly my left hand, I believe. All the time the scuffle was going on we were fighting for possession of the gun. I believe I hit him twice with the gun butt, but, again, it seemed to have no effect onhim.

(continued next page)

ST:TR 1/2

I then withdrew from the car, still fighting for the gun, and the subject came with me. The scuffle continued outside the car and down the left side towards the rear.

Just after we got out of the car I heard a loud noise, apparently the gun had discharged, but I felt no recoil, and saw no flash. The subject gave no indication that he was aware that this had happened.

The struggle and fight for the possession of the gun continued down the entire length of the left side of the car. Then we got to the rear and we continued across the rear trunk as we got approximately in the center of the car the gun went off again. The subject slumped to the ground. I noticed at this time that the police assistance was arriving. I could see the lights coming in all directions.

I stood there a moment and then walked back to the left side of the car.

I recall someone coming and telling me a number of times to put my gun back in my holster. As I did, I realized that the handgrasps were missing from the gun. I put the gun into my holster. Two men in an unmarked car took me into the car and then drove me to the hospital.

MR. GARDNER: I have nothing further your Honor.

MR. WEITZ: May I proceed, your Honor, with

next witness?

THE COURT: Go ahead.

1/3 DONNA NELSON, called as a witness, having been first duly sworn by the Clerk of the Court was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEITZ:

Q Did we ever meet or see one another before today, to your kowledge?

THE COURT: Keep your voice up.

Q Miss Nelson, I am going to stand back here. I ask you to face this way, project your voice this way. If I can hear you we will assume everybody else can, will you do that ma'am?

A Yes sir.

Q Were you subpoenaed here to court today?

A Yes, I was.

Q And have you before today spoken to any police officers in connection with what you know of the events of the kind of September 29, 1972?

A That night?

Q On September 29 of 1972 did you attend a rock concert at the Nassau County Coliseum?

A Yes.

Q You have a very soft voice, it's almost impossible to hear.

By the way, could you tell us who you work for and what you do?

A I work for a real estate office, I am the bookkeeper and secretary and office manager for one of the offices.

Q Where are they located, this real estate office?

A Medford.

Q Is that Long Island someplace?

A Yes.

Q It seems you will have to keep your voice up, will you do that please?

A Yes.

Q On September 29 when you went to the Nassau County Coliseum were you alone or with others?

A With others.

Q Would you tell us with whom you went?

A My husband, his sister and a friend.

Q Give me the names.

A David Nelson, Linda Nelson, and Kevin Collin.

Q Was your husband a musician?

A Yes.

Q Was he playing in one of the groups there?

A Yes.

Q Were you -- tell us when you got to the Coliseum that evening?

A Just before the first group went on.

Q Do you recall what time that was?

A Probably around 8:00.

Q Was that the group in which your husband performed?

A Yes.

Q How long did that part of the performance take?

A I guess about an hour.

Q There was more than one group playing that night?

A Yes. Three groups.

Q At the end of the time of the performance -- what is the name of your husband's group?

A Ramatan.

Q He was one of the musicians in that group?

A Yes.

Q When Ramatan finished playing, that group finished, will you tell us, were you in the Coliseum itself?

A Yes.

Q Were you seated or were you standing someplace?

A We walked around and we watched the second group.

Q You mean your husband and the other members of your party?

A Right.

Q How long did that second group play for?

A About another hour.

Q Did you remain there during that period of time?

A Yes.

Q And then after that what did you do?

A We left.

Q Did you leave directly, or was there packing of instruments to be done; or anything like that?

A He just took his guitar.

Q Was that something with amplifying equipment?

A No. Just the guitar.

Q Did you stop for anything in the Coliseum, or walk right out; as best you can remember?

A We pretty much left after that. We didn't want to hear the last group.

Q You didn't think too much of them?

A No.

Q Then I won't ask you the name of the group.

MR. WEITZ: If your Honor please, I would like to get one of the photographs that are in evidence. I am sorry, I forgot you gave me those the last time.

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MR. GARDNER: May I hand this up to the witness Judge?

THE COURT: Yes.

Q I show you that photograph, Plaintiff's Exhibit 11 in evidence, an aerial view of the Nassau Coliseum. Could you recognize the area from that picture?

A That looks like it.

Q Are you able, by looking at that picture, to orient yourself to where you were when you left the Colisuem that night? Is it possible for you to do that by looking at that?

THE COURT: The answer is just no.

Q When you left the Coliseum, could you tell us if you recall, what entrance it was that you and your party exited, you and your party used to leave the Coliseum?

A I don't know.

Q Will you tell us where you walked and what you did?

A We went out one of the exits and we thought it was one we parked near, but it wasn't.

We looked for the car and we walked around the building, and then we started walking out around the parking lot.

Q Were you trying to find your location, was that

it?

A Yes.

Q When you say, "We", who was with you?

A My husband David, Linda and Kevin.

Q Will you tell us, and tell this jury in your own words just what you did and saw happen while you were walking through the parking lot that night?

A When we first came out of the building we saw a boy trying to get into the door. The guards were pushing him away, the guards at the Coliseum. He kept trying to get in.

He was saying he was in the band that was going on, that he was the guitar player Alvin Lee. And he was very upset. He didn't have a ticket and the guards finally, two of them picked him up, carried him to the parking lot and threw him out there.

As we kept walking around the building we kept seeing him trying to get in other doors and a lot of them were locked and some had guards that were holding them shut. Then, we went out into the car area where we were looking through there, looking for the car and we saw a police car come up.

Q Do you recall the color of the police car?

A No. I think it had white.

Q You think it was white?

A Yes.

Q When this police car came up where was it? When you say came up, came up where?

A A few aisles up from where we were walking. We kept walking towards it looking for the car.

Q Were there other people walking in the parking lot?

A No, there may have been one or two other people, but most of them were still inside.

As we were walking towards the police car we heard a shot, my husband David went ahead of me and -- but we all kept walking towards the car.

As we got to the car --

Q What car?

A The police car. We were near the police car now. The policeman had the boy we had seen running up to the doors, he had him by the hair.

Q By what?

A The hair.

Q On his head?

A Yes. And the boy was swinging his arms.

Q Did the boy have anything in his arms?

MR. GARDNER: Counsel asked the witness to tell

in her own words, now he is interrupting the witness.

THE COURT: He asked whether the boy had anything in his hand.

THE WITNESS: No.

Q What did you see happen next?

A I believe the boy broke away for a moment to try and get near the police car. The policeman grabbed him again, had him by the hair and swung him around.

Q Who swung who?

A The policeman swung the boy around. He had him by the hair and he had the gun in his hand.

Q Which hand?

A The right hand, and it was down by his side.

He swung the boy around, he liften up the hands and he fired the gun. It was between him and the boy.

Q What did you see happen then?

A The boy, he let go of him and he just fell on the ground.

Q Where was this; what part of the car?

A At the back of the car.

Q How far away were you from the place where the shooting occurred?

MR. GARDNER: Objection to the form of the question, if your Honor please.

THE COURT: How far away were you from the police car when you saw this?

THE WITNESS: From the policeman?

THE COURT: From the pelice car when you say you saw all these incidents?

THE WITNESS: I would say from here to the table.

MR. WEITZ: Which table does she mean?

THE WITNESS: This table.

THE COURT: How much in distance would you say that was?

THE WITNESS: Maybe 8 feet, 8 or 9.

Q Where were the other members of your party at that time?

A David was in front of me to the side, Linda was here and Kevin was a little bit behind her.

Q Did you give your name to anybody after this occurrence?

A Yes.

We went up and told the officers that came after that, that we had seen what had happened.

Q Were you questioned by anybody subsequent to this event?

A We were all taken in separate police cars to

a precinct, and then I believe they took us to a second precinct that wasn't the first place we went.

We all gave statements.

Q Was that something that you wrote out, or signed or what, if you remember?

A The peliceman wrote down what we said and we signed it.

Q Did you read it before signing it?

A Yes.

Q Have you seen it since?

A No.

Q Have you read anything since to refresh your recollection as to these events?

A No. Well, at the Grand Jury hearing.

Q You went to a hearing?

A Yes.

Q You testified?

A Right.

Q Did you read any transcript to what testimony you gave?

A Since then?

Q Yes.

A No.

Q At that time did anybody type up --

A That time they gave us copies of our statement to read.

Q Copies of which statements?

A The statements we made to the policemen that night. They gave us a copy before we testified at the Grand Jury.

Q I am talking about whatever testimony you gave at that time. Did anybody ever type that up and give it to you?

A No.

Q Did you keep a copy of that statement that was given to you?

A It was just shown to me and then taken away.

Q The time this police officer fired this weapon into this boy, where were the boy's hands?

MR. GARDNER: I will object to the form of the question.

THE COURT: Rephrase the question.

Q When they were at the back of the car, when you saw the policeman with a gun in his right hand where were the boy's hands?

A In the air.

Q Did you ever see him strike the cop?

A No. He was waiving his hands, but I didn't see

strike anybody.

MR. WEITZ: I don't have anything else, Judge.

CROSS EXAMINATION

BY MR. GARDNER:

Q Mrs. Nelson, as of the 29th, that means before the 29th of September, 1972, the date of this incident, did you ever have occasion in your life to see people on hallucinating drugs?

A Yes.

Q Is it commonly known between young people as a term called tripping?

A Yes.

Q Explain to the members of this jury what your understanding is between the culture and people who take LSD, what does that mean?

MR. WEITZ: Objection to the form.

THE COURT: Overruled.

THE WITNESS: Hallunicating.

Q What does hallunicating mean in reference to taking, let's say LSD?

A I guess a distorted vision.

Q Have you had any such experiences of your own?

A No.

Q On the 29th of September 1972 had you taken

any drugs?

A No.

Q Marijuana?

A No.

Q When you first saw -- by the way, the boy that was ultimately shot, you had seen him before the shooting, right?

A Yes.

Q When you saw him before the shooting he was trying to get into the Coliseum, isn't that right?

A Yes.

Q And he didn't have a ticket, isn't that right?

A Right.

Q Now, the guards that kept him out of the Coliseum, they weren't county police, they were guards that work for the Coliseum?

A Right.

Q And you heard this boy saying that -- he was telling the guards he was Alvin Lee you said?

A Right.

Q Now, is Alvin Lee a well known -- at least within the group that goes to rock concerts -- a well known guitarist?

A Right.

Q Do you know what Alvin Lee looked like?

A No.

Q The boy who said he was Alvin Lee, trying to get in without a ticket, how long was his hair?

A Kind of frizzy, longish.

Q Did he have a beard?

A I think something underneath, nothing right on his face that I remember.

MR. WEITZ: She indicated underneath, and pointed to the neck and chin area.

THE COURT: Do you recall that he had hair on his face?

Q When you first saw that person at the time that he was trying to get into the coliseum, did you arrive at an opinion from your own prior experience that that person was hallucinating?

A He seemed irrational.

Q Did you come to an opinion when you saw that person, at the time he was first trying to get in to the Coliseum saying he was Alvin Lee, being on a trip, or tripping?

A He could have been on anything.

Q Were you of the opinion when you saw him there trying to get into the Coliseum without a ticket, saying he

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was Alvin Lee, that he was on LSD or suffering the effects of hallucinating on LSD?

MR. WEITZ: Objection.

THE COURT: I'll allow it.

THE WITNESS: He seemed stoned.

Q When he say he seemed stoned, would be kind enough to explain it in layman's terms so I and the jury can understand when you say at the time you saw this person trying to get into the Coliseum without he ticket, he seemed stoned?

A He seemed irrational and seemed like he had done some sort of drug.

Q You say he was irrational. Could you describe that a little better so the jury can get a better idea that he seemed to be on some sort of drug.

What was the impression you had when you watched him?

A It was just that he was saying he was Alvin Lee and he was trying so hard to get into the concert. He seemed like he was panicking because he couldn't get inside.

Q How did he manifest his panicking when he couldn't get inside?

A He was trying all the doors.

Q Trying them in a quite calm manner, or in a

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irrational manner; what did you observe?

A He was just walking around trying all the doors, pulling on them.

Q That was after the guards wouldn't let him in?

A Right, and before.

Q How much time passed from the time you saw that happening from the person and the youth, you came to the conclusion that he was stoned or tripping, to the time you heard that first shot?

A I would guess maybe 10 or 15 minutes. We had been just walking around in circles. I couldn't say for sure.

Q When this person was talking to the guards at the Coliseum, were they talking to him calmly?

A No.

Q They were not?

A No.

Q Did he break away from those guards at the Coliseum?

MR. WEITZ: Objection. We haven't had any testimony he was being held.

THE COURT: Overruled.

THE WITNESS: No. They pushed him away.

MR. GARDNER: Can we mark this for identifi-

cation?

THE COURT: Exhibit A. Do you want to mark it?

MR. GARDNER: Yes, sir.

THE CLERK: One statement marked for identification as Defendant's Exhibit A.

Q Did you ever tell anyone that the guards, in reference to that boy, the person trying to get into the Coliseum, that the guards were talking nicely to him and were walking him towards the parking field and he broke away?

A The first time.

MR. WEITZ: If your Honor please, that is an answer.

THE COURT: Carry it on from there, she can answer the next question. Don't interrupt.

Q The question is, did you ever tell anybody that in fact the guards were talking nicely to him and started walking him towards the parking field and he broke away from the guards?

A The first time they took him.

Q Did you say it?

A Possibly. If you have it there it's what I said.

MR. WEITZ: I'll object to that.

THE COURT: Overruled. The question is, did you ever make that statement Miss Nelson?

THE WITNESS: I could have.

THE COURT: You don't remember?

THE WITNESS: It's been four years.

Q Would say, Miss Nelson, that your memory on the day of September 30, 1972, the day after this occurrence, was better than it is today, almost four years later?

A I would say specific statements.

Q I am going to show you the first page of this, which has been marked Defendant's Exhibit A, and I am going to ask you to look at it and ask you to read it and when you get finished at the bottom I am going to ask you this question.

Did you, or did you not say on September the 30th, 1972, one day after the event, that the Guards at the Coliseum were talking to that person who was attempting to get in and talking to him nicely, walked him to the entrance and that he broke away?

Take your time.

A What was the question?

Q Did you, the day after this event, the 30th of September 1972 say that the guards were talking nicely to him. The guards at the Coliseum, walking him to the exit and

he broke away?

A Yes.

Q Was that true?

A Yes. The second time they walked him out there roughly and threw him down.

Q Threw him down?

A They pushed him down and they told him to stay out.

Q Did you say to anyone on the 30th of September 1972, that after the guards who had spoken nicely to him, walking him to the door and he broke away, that after that Mr. Haber ran back to the door and there were more guards there, is that right?

A Yes.

Q And were those guards that pushed Mr. Haber, shoved him out as you just described, the second time?

A Yes. I think it was the second time.

Q Did you say the day after the event, the 30th of September 1972, in reference to the second set of guards, the more guards, that the more guards at the door wouldn't let him and they took the boy, they walked him out to the parking field lot a short distance and they let him go?

A They didn't let him go.

Q Did you ever say that?

A I don't remember.

MR. GARDNER: Mark it.

THE CLERK: Statement marked for identification, Defendant's Exhibit B.

Q I am going to show you Defendant's Exhibit B. I want you to read that first portion there that follows right after Exhibit A, leaving off where the guards walked him to the door and he broke away. Read that next paragraph, you tell us, does that refresh your recollection as to who you said the day after this occurrence and the 30th of September 1972.

As far as the second set of guards are concerned they walked him to the door, to the parking lot and let him go?

A Yes. That is what I said.

Q Was it true.

A They let him go. They didn't let him go easily.

Q Is it true?

A The statement; yes.

Q By the way, have either you or your husband, or any of these rock groups ever have a difficulty with the police department?

MR. WEITZ: Objection.

THE COURT: Overruled.

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MR. WEITZ: Difficulty with the Police Department?

THE WITNESS: What sort of difficulty?

(Cont'd on next page.)

Q A hassle with a cop.

MR. WEITZ: As to her or others, Judge?

THE COURT: Her or her husband. Anybody in this rock group.

THE WITNESS: No, I don't know. He has been in so many groups, but as far as I know nobody has, my husband and I haven't.

Q Do you have any feelings about police officers, Police Department?

A You mean bad feelings?

Q Yes.

A No.

Q Now, after the first group of Coliseum guards walked this person to the door and he broke away, after the second group of guards walked him to the door and let him go in the parking lot, wasn't the next time you saw that person out in the parking lot during the time that the shooting, or firing of the weapon ultimately occurred?

A Well, at different times we saw him going around the building trying the doors.

Q But was unable to get in?

A Right.

Q You never saw him with any set of guards after that second set of guards?

A No.

Q You then saw him going around trying the doors and the next time when the ultimate occurrence happened?

A Right.

Q At the time that you saw this person, the next time, after he had left the Coliseum and was now in the parking lot, were there two girls in the vicinity of himself and the policemen?

A Further down the road.

Q Were the two girls crying?

A Yes.

Q Could you describe the two girls that were crying?

A No, I didn't see them. I don't remember seeing them. At the time, vaguely, in the dark, I saw them.

Q About how far away from the policemen's car were these two girls that were crying?

A Maybe six or eight carlengths. I don't know, car bumpers.

Q Did you ever inquire about them? what they were crying about?

A No, I didn't speak to them myself.

Q Did you ever see another girl who was in the police car at one point, before you heard the shot?

A No.

Q Did you ever hear the car being reved up? You know what reving up a car means?

A Yes.

Q Do you know what that means?

A Racing.

Q Did you ever hear that?

A No, I don't recall.

Q Did you ever see, in addition to the police car, another car that was stopped in the aisle that couldn't get past the police car?

A There wasn't any car near there. I don't know that I couldn't get by.

Q Was it in the aisle?

A Yes, but I don't remember at what time.

Q Do you know if there were any people in the car?

A No.

Q Do you know where the occupants might have been in the vicinity?

A No.

Q Did you see any other people around?

A We were mostly watching the policemen.

Q While you were watching the policemen, did you

see any other people?

A I didn't notice.

Q When you heard the first shot and turned to your girlfriend, did you duck?

A Yes.

Q Where did you duck after you heard the first shot?

A Just ducked down a minute behind the car right in front of us.

Q Was that car separating you from the policeman and the boy?

A Yes, but then we got right up and walked on.

Q And when you walked, did you walk to where you had heard the first shot or where that shot had come from, or a different direction, away from where the shot came from?

A Towards the police car.

Q Do you know what happened between the boy and the policeman prior to your hearing the second shot?

A I could only vaguely -- The second shot?

Q Prior to your hearing the second shot did you see anything happen between the policemen and the boy?

A Yes, the boy was struggling.

Q Waving his arms, you described?

A Yes.

Q Did you see what happened between the boy and the policemen before you heard the first shot?

A Not really much, no.

Q Did you ever see the boy and the policemen in the car?

A I saw the policemen trying to get him away from the car.

Q You never saw the two of them in the car?

A No.

Q Do you know where the policemen and the boy was when the first shot went off?

A They were standing there, standing near to where they were the second shot.

Q Well, where were they when the second shot occurred?

A Towards the back of the car.

Q Where were they the second shot?

A Near the same place.

Q How far away were you from the scene when you heard the first shot?

A Maybe one and a half cars.

Q Were you between the aisles?

A What do you mean?

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THE COURT: Were you between two sets of aisles, or between cars?

THE WITNESS: Well, we were one aisle over.

THE COURT: You were a whole aisle away?

THE WITNESS: We're here by -- I would say the middle. There is an aisle, then there is a car and another car and another car and an aisle.

I would say we were by the second car.

THE COURT: You were in between cars then?

THE WITNESS: Yes.

Q Mrs. Nelson, didn't you say the day after the occurrence, the 30th of September, 1972, concerning the second shot, that suddenly you heard another shot, that you didn't see that shot fired because you were calling for Kevin?

MR. WEITZ: Is that a direct quote? Is he quoting or paraphrasing?

THE COURT: He's asking if she ever said that.

A I don't think so.

Q When you say, "I don't think so," are you telling us you don't remember? Where was Kevin before that second shot?

A Kevin was right behind me.

Q Behind you?

A Yes.

Q And before the second shot was fired, did you turn to Kevin?

A I called Linda right after the first shot.

Q I beg your pardon?

A After the first shot I called Linda.

Q Ma'am?

A Linda.

Q Where was Linda running?

A She was coming up by me.

Q When you called to Linda, did you have to turn in any direction?

A Well, she was right to the side over here.

Q Did you call to Linda between the first and second shot?

A Yes.

Q And when you called to Linda between the first and second shot, did you turn to your right to call to Linda?

A Yes.

Q Isn't it a fact that you never saw the second shot fired because your head turned?

A I saw his hand come up.

Nelson-cross

Q Isn't it a fact that you never saw the second shot fired?

A How do you mean, "fired"? I didn't see his hand pull the trigger. I saw the hand come up and the gun went off.

Q Until the time that hand came up, until the shot went off, you had turned to call or speak to your girlfriend?

A No, I don't believe so.

MR. GARDNER: Mark this, please.

THE CLERK: Document marked for identification as Defendant's Exhibit C.

(So marked)

Q I am going to ask you to look at Defendant's Exhibit C, which follows A and B. I am going to ask you to look at it and refresh your recollection, and you tell me whether or not it refreshes your recollection. You have said on the 30th of September 1972 that they were both standing behind the police car and suddenly "I heard other shot. I didn't see the shot fired because I was calling for Kevin, then saw Linda, I then saw Linda walk up toward the policeman and then she said something."

A I did hear another shot, but I saw it.

Q Did you say on the 30th of September 1972

"They were both standing behind the police car. Suddenly I heard another shot. I didn't see the shot fired because I was calling for Kevin. I then saw Linda walk up towards the policemen." Did you say that?

A I said that, but--

Q Did you say on the 30th of December 1972?

A Yes.

Q Did you sign your name to it?

A Yes.

Q Was your memory better the day after the event than it is four years after the event?

A He asked me if I saw the fire from the shot, and I didn't see the fire from the shot.

MR. GARDNER: A simple question, your Honor.

MR. WEITZ: I object to that, Judge.

THE COURT: Sit down.

Is your memory better today than it was four years ago?

THE WITNESS: Naturally it would be better four years ago, but they didn't ask me that.

MR. GARDNER: Mark for identification.

THE CLERK: Marked for identification as Defendant's Exhibit D.

(So marked)

Q Now I am going to show you all four pages, Defendant's A, Defendant's B, Defendant's C, Defendant's D. Is that, in fact, the statement that you read that you signed on each and every page concerning your recollection of the events as you best recalled them the day after the event, September 30, 1972?

MR. WEITZ: Objection to the form.

A This is my signature.

Q On each page, isn't it?

A Yes.

MR. GARDNER: Nothing further at this time, your Honor.

MR. WEITZ: Redirect, your Honor?

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. WEITZ:

Q Donna, the paper that was shown to you had your signature on the bottom, correct?

A Right.

Q Whose handwriting was it?

A The police officer's.

Q And were you watching as he wrote?

A No, I was sitting across from him.

Q Did he ask you if you saw the fire or flash from the gun?

A Yes.

Q And you told him you did not?

A Right.

MR. GARDNER: I'll object to the leading question.

THE COURT: Don't lead.

Q While he wrote did there come a time you were asked to sign that paper?

A Yes.

Q Did he also indicate to you places on the paper where he had written words, crossed them out, written new words, and asked you to initial it?

A Possibly. I don't remember.

Q This person we are talking about, that was somebody from the Nassau County Police Department, wasn't it?

A Yes.

MR. GARDNER: I object to leading the witness.

THE COURT: Don't lead the witness.

Q Where was the statement taken?

A Nassau County, at the police precinct.

Q The individual who took the statement from you, did he identify himself by any way to you, by way of name, rank, or occupation?

A Not that I recall.

Q Do you know whether he was a police officer or a civilian?

A He had on regular clothes.

Q Did he have a badge on; do you know?

A I am not sure.

MR. WEITZ: I don't have anything else, Judge.

THE COURT: Mr. Gardner, are you going to take a few minutes? I will let the jury go to lunch.

Mr. Gardner, do you want to look and see if you're going to have something additional?

MR. GARDNER: Yes. I will have something more for this witness.

(At 1:05 p.m. a luncheon recess was taken.)

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(Whereupon after lunch the following occurred in open Court outside the presence of the Jury.)

THE COURT: Gentlemen, this morning you said Mr. Weitz, that you had subpoenaed some records from the Nassau County Police Department and that they have not produced the same.

Now, they called in this morning and spoke to Mr. Dwyer, one of my law clerks and said they had produced those records last summer. I don't remember seeing, as Mr. Dwyer handed me, during the lunch hour. He handed me a file which I don't know whether it's the subpoenaed record or not. The only reason I didn't come out and send it to you Mr. Weitz, last summer. Also I think it was this case -- there was a subpoena for a police department file pertaining to Mr. Salmyer which I was asked to examine in camera. I don't know if this was part of that file, but I think I sent that file back. I don't know how I should handle this. I think what I should do is -- are you familiar with these?

MR. GARDNER: I have not seen the subpoena. I don't know which records he is making reference to, your Honor.

THE COURT: Of course I didn't see the subpoena

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either, but I don't know what this accomplishes. It's just a batch of documents as far as could see, or copies of same.

MR. WEITZ: I take it, the Court would like to see the subpoena.

THE COURT: I think we should take a look at the subpoenas in the first instance. This I might add has a back on it and answers to interrogatories and has Bower & Gardner's legal background.

MR. GARDNER: It might be some correspondence from my office, or whatever office that came from.

THE COURT: I am hesitant to say these are the documents and in turn something, you or Nassau County might think improper to turn over.

It's got a number of various things in it. I might add that the two top documents are already in evidence. One is the training record which is marked in yesterday and the other is the guide line. Those two are already in evidence, so you can have those.

MR. WEITZ: If there isn't a form 350 in those papers then it doesn't pertain, at least one the subpoenas I ussued.

THE COURT: Maybe the simplest thing for you

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to do is to give the subpoena to Mr. Bower and let me give these papers to Mr. Bower and let him look, and maybe he'll say there is nothing in here. Maybe it's his file and he will identify it as such. Is there any objection to that?

MR. WEITZ: It's kind of unusual, Judge.

THE COURT: This is a Nassau County file and this is his client.

MR. WEITZ: I think it's most unusual for my adversary to tell me whatever I have subpoenaed is there or not.

THE COURT: The only thing I can do is ask my clerk to go out and tell the fellow to come in here who has custody of the record and come in here and let him testify.

MR. WEITZ: I think that would be the appropriate way to do that, Judge.

THE COURT: Isn't the police officer still here?

MR. WEITZ: I would expect he would be.

We have a list of all the things we have subpoenaed. These are some of the subpoenas.

THE COURT: Give them to Mr. Dwyer and he'll take them up with the guy on the phone.

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MR. WEITZ: There are specific forms.

THE COURT: I don't recall any.

MR. WEITZ: There are specific reports we did do discovery which incorporated by reference other papers which were never furnished to us.

I subpoenaed those other papers that were subpoenaed by reference. There has to be an end to -- I think I have a right to have those.

THE COURT: I don't want to give you some records that you didn't subpoena.

MR. WEITZ: I am not interested in anything I didn't subpoena, Judge.

THE COURT: It's the best thing I can do unless you can think of some better way.

THE COURT: Let's proceed.

MR. GARDNER: Your Honor, over the recess I made my judgment. I don't think I am going to proceed any further with re-cross of Mrs. Nelson, so I have no further need for her.

THE COURT: You are excused Mrs. Nelson.

MR. GARDNER: I indicated to your Honor I am not going to trouble Mrs. Nelson with any further questions.

MR. WEITZ: Mrs. Haber, take the stand.

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(Whereupon a sidebar conference was held outside the hearing of the jury.)

THE COURT: Go back in the courtroom. I am going to apply the rule that she must leave and I don't want her here.

MR. WEITZ: I didn't realize, Judge. Thank you very much.

THE COURT: Why don't you go over and have them quietly ask her.

MR. WEITZ: I will have my associate at the table do that.

* * *

AFTERNOON SESSION

MR. GARDNER: Your Honor, over the recess I made my judgment. I don't think I am going to proceed any further with recross of Mrs. Nelson, so I have no further need for her.

THE COURT: All right, Mrs. Nelson, you can step down.

(Witness excused)

MR. WEITZ: Mrs. Haber, take the stand.

P E A R L H A B E R, called as a witness, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. WEITZ:

Q Mrs. Haber, you are the mother of the lad that was killed in this event, this occurrence?

A Yes.

MR. GARDNER: Objection to the form of the question, your Honor.

Q Did your son die on September 29, 1972?

A No, my son was killed.

THE COURT: Strike out the answer.

Q On September 29 of 1972, were you the mother

of George Haber?

A Yes.

Q When was your son George born?

A September 23, 1954.

Q Was he an only child?

A No, he was my only son.

Q How many other children do you have?

A I have a daughter of thirteen and a married daughter.

Q What is your married daughter's name?

A Francine Grahm.

Q She lives with you?

A No, with her husband and children.

Q Where?

A With her husband and children in New Jersey.

Q Does your 13-year-old daughter live with you?

A Yes, she does.

Q What is your husband's name?

A Max.

Q Is that the gentleman with the gray hair in the front row?

A Yes.

Q When were you and Mr. Haber married?

A In 1940, or 1942. I don't remember too well.

Q What was the date of your marriage?

A It was sometime in September.

Q What was the anniversary date?

A I think it was September 13.

Q Where did you live at that time?

A When I was married? Well, I lived in the Bronx until my husband went into the Service. My husband was in World War II, and then when he came home we moved to Fale Street in the Bronx.

(Whereupon a sidebar conference was held.)

Q Where do you say it was you lived?

A Fale Street, 1051 Fale Street.

Q At that time you lived in Fale Street in the Bronx did the family consist of your husband, yourself, and your daughter?

A My oldest daughter was born there and George was born in Fale Street.

Q Did George attend public school some place?

A Yes, he did.

Q Where was that?

A 94, a Kings College place in the Bronx.

Q P.S. school?

A Yes.

Q Did he complete some level of education there?

A He did.

Q Where did he get?

A 94 went up to the sixth grade. He made the S.P's. It's a Special Progress Class. This is when they enter junior high school they complete three years in two years.

Q In PS 94?

A He went up to the sixth grade, then he went to Junion High.

Q When he went to Junior High School did he enter a special program?

A Yes, I told you he made what they call the SP's. It's a special progress class where children, if they pass a test, can complete four years in three years.

Q What school?

A 80, I think it was 80.

Q In the Bronx?

A Yes.

Q As a child what was the state of his health?

A Good. He had allergies; he did, and he was allergic to dust and hay fever.

Q Other than that?

A No, just the normal childhood diseases.

Q Did there come a time that your son George --

Let me ask you this:

While he was in junior high school did he belong to any clubs or organizations?

A He was a cub scout and then joined the Boy Scouts.

Q For how long a period of time was he in the Cub Scouts?

A He started-- I think they start when they're seven or eight, and I think it's until about eleven, then they become Boy Scouts.

Q Was he a Boy Scout for some period of time?

A For a period of time.

Q Did there come a time that he went from junior high school to high school?

A Yes, he did.

Q What high school did he go to?

A He went to high school in Spring Valley.

Q Had you then moved to Spring Valley?

A We just moved, and he attended the school in Spring Valley.

Q Had he attended any high school in the Bronx?

A No. He was supposed to attend DeWitt Clinton High School, but then we moved.

Q What school in Spring Valley did he attend?

A Spring Valley Junior High School.

Q Did he complete four years of high school in Spring Valley?

A Yes.

Q When he was attending high school did he have a type of employment?

A He always worked.

Q What did he do?

A In high school -- when he was in 80 he worked as a delivery boy for a drugstore where we lived. Then he delivered when we moved to Spring Valley. He must be about -- I'm not sure if it was fourteen or fifteen.

Q Did he work there?

A Yes, he did.

Q What jobs or work did he have while he was attending school, or summers, during those years from the time he went to Spring Valley High School until the time he finished Spring Valley High School?

A When he was going to high school he worked in Shoppers Pardise. It's like a food store.

Q What did he do there?

A For a while he worked in the food--putting things on the shelves and for a while he worked in the restaurant part of that store. I don't know what they call

it, a bus boy. They clean the dishes and pick up the dishes and things.

Q How long did he do that work? What were his hours?

A Well, he went after school. His hours were in high school. School was out at about ten after two and that job was from five at night. In fact, he would come home--

Q From five p.m. until ten p.m.?

A Right. He would get home from school at 2:30 and then he would have his supper, do his homework and then go to his job.

Q How many days a week did he do that?

A Five days a week, sometimes on Friday.

Q Did he earn money at that work?

A Yes.

Q What was done with that money?

A I had an agreement with my son. I told him that as long as I had money, he would never be in need, but when we needed money he should share with us. We had an agreement that whatever he earned he would give me twenty-five percent of what he earned when he was earning it, if he could. If he ever wasn't, I would never let him down

Q You would never what?

A As long as I had--

Q The last part.

A I would never let him down; I would always do what I could.

Q Did he continue then to give you?

A Yes, he did. He continued twenty-five percent of whatever he earned at nighttime, and in any job that he worked.

Q Did he keep this agreement with you?

A Yes, he did.

Q Did he work at other places besides Shoppers Paradise?

A From the time he was sixteen and got working papers until the day he was killed.

MR. GARDNER: Objection, your Honor please, move to strike.

THE COURT: Strike out "he was killed."

THE WITNESS: He was even excused in his job at Rickles that night to go to the concert.

Q On the night of his death he had a job?

A He was working, yes.

Q Where?

A In Rickles.

Q What is Rickles?

A A department store in Muncy.

Q Where?

A A department store in Muncy.

Q Muncy, New York?

A Muncy, New York.

Q Is that a nearby community to where you live?

A Yes.

Q What did he do there at Rickles?

A I guess it was like a sales person.

Q What did he earn?

A I really don't remember. Whatever the rate of pay is. I don't know. I think the rate of pay might be $2 an hour.

Q Ma'am, did he ever work for a Sidy Clean Corporation?

A Yes, he did.

Q What did he do for that?

A That was a cleaning store.

Q What did he do for that?

A I guess he put tags on or waited on customers. Whatever had to be done.

Q Did he ever work for a Redi Carpet in Spring Valley?

A Yes, he did. He worked for Redi Cut Carpet

the summer he was killed, on September 29--

MR. GARDNER: Strike it.

THE COURT: Strike it out.

A He worked for Redi Cut Carpet that entire summer.

Q Did he work for a place called Behr's Hotel?

A Yes, he did.

Q What did he do there?

A He worked as a busboy. He worked there in the summer.

Q Is that a vacation -- '72?

A Yes, he worked there in the summer, one summer, and he worked during the Easter holidays.

Q Was that for salary alone, salary and tips?

A No. Well, I think they paid him a small salary and he got tips.

Q What kind of student was he in high school?

A He was always a good student.

Q When he graduated-- Did he graduate?

A Yes, he did.

Q Did he go on to some post-high-school education?

A He went to Rockland Community Collete.

Q Is that in Rockland County?

A Yes.

Q Is that where you live, ma'am?

A Yes.

Q Do you know what course of study he was pursuing?

A He took psychology and sociology.

Q Was a tuition charged by the--

A My son was under a work-study program.

Q Explain that to us.

A I didn't pay for it. It was sort of like a scholarship.

MR. GARDNER: I'll object to it,"it's a sort of like." I think she can describe the manner in which he was able to go to community college by working part time.

THE WITNESS: He worked part time by the school, the school arranged his hours to correspond with the courses he was taking.

Q Where did he work?

A The college library. During the regular school hours I htink they let him work two or three hours a day. It wasn't very much because they felt he needed the time to study. But he did work at the college. Also the summer before he entered college, because he had made

out the application for college and they tried to help their students. So it was that summer he worked at the college, and when he started going to the college then, they gave him the two or three hours a day.

Q In the library?

A In the college library.

Q In addition to that did he hold other jobs?

A Not when he went to college, no, because he had to study.

Q This job with Rickles that was during the summer, is that it?

A No, he worked in Redi Cut Carpets all that summer, I think it was the summer. It's becoming clearer in my mind.

I was never-- Now I'm getting a little calmer.

Q Tell us when.

A It was in 1972, that summer he worked at Redi Cut Carpets, he worked the whole summer. Then they needed someone part time so it was then that he got the job at Rickles, because he was going back to college and the hours at Rickles were -- well, I picked him up. His college class ended about four o'clock and I picked him up every day at four o'clock, both my daughter and I, from the

college. We would have something out to eat and then I dropped him off at Rickles. He was supposed to start at five o'clock, so it just gave us time.

Q How much money a week was he giving you when he worked during that summer?

MR. GARDNER: Which year?

MR. WEITZ: 1972.

A When he worked at Redi Cut Carpet, 25 percent.

Q Could you give us a dollar amount?

MR. GARDNER: I am going to object.

A Whatever his salary was, if he made one hundred dollars a week, 25 percent of $100 is $25.

MR. GARDNER: I think I can be helpful in this regard. We did ask plaintiff's counsel to--

THE COURT: Whatever the figures show.

MR. WEITZ: We'll agree another time.

Please just answer my question, all right?

MR. GARDNER: If your Honor please, look at the responses to plaintiff's interrogatories.

THE COURT: She's testified she doesn't know.

THE WITNESS: I have all the statements, all the withholding statements.

Q Mrs. Haber, how did George get along with the family? With you, your husband, your younger daughter,

your older daughter?

A We all got along.

Q Could you tell us, were you close to one another? Was it an occasional thing that he saw the family? Did he go out with the family? What could you tell us about your family relationship?

A Like I told you, I drove my son to school and I picked him up after school and drove him to work. Well, he had friends, but I knew his friends. He'd bring them to the house.

(Continued on the next page)

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Q Did he do anything around the house?

A He mowed the lawn. He would do things that had to be done.

Q What sort of things?

A He helped with mowing the lawn. I don't know. Whatever little things that had to be done.

Q When you say "whatever little things," you have to tell us for the record what little things you mean. Be it dishes or cleaning or anything.

A He didn't like doing dishes; he didn't like doing dishes, but he would help with heavy things.

Q Like what?

A If I had to move things around, if windows had to be cleaned.

Q Did he help you then?

A Yes, he did. I mean it's hard for me to remember.

Q Did he do these things voluntarily, or did you have to plead with him to do them?

A I didn't plead with him if he knew it had to be done, or I told him I was tired or something, he helped.

Q Mrs. Haber, will you tell us for the record what is your date of birth, ma'am?

A August 24, 1924.

Q Were there any particular talents or characteristics about George?

A My son played the piano from the time he was four years old. I taught him music myself. When he was seven years old he started with a piano teacher and took piano lessons until he was about fourteen or fifteen.

Q Did he like music?

A He loved music.

Q Did he ever play for you?

A Of course he did. He played in school. In fact, when he was in kindergarten he played "America" in the auditorium, and as he got older--

Q Did he belong to any music clubs or anything like that in school?

A Out of school?

Q In school.

A Yes, he was in the chorus in school; he joined the chorus.

Q Did he write?

A He didn't write books; he just wrote reports and things that he had for school.

Oh, yes, there was one time, I think, in college -- in fact, if your Honor will permit me?

THE COURT: The question was, Did he write,

ma'am, and you answered it. That is all for the moment.

MR. WEITZ: Your Honor, I misplaced an exhibit.

MR. GARDNER: There is no question pending before the Court.

Q Do you have a poem that he wrote?

A Yes, I do.

Q Do you have anything else that he wrote?

A Yes, I do.

Q What do you have that was written?

A This.

THE COURT: Don't give us a speech.

Q Ma'am, tell me, please--

THE COURT: Take the three documents that are alleged to have been written.

Are these the three documents alleged to have been written? Don't tell us what they are. Don't ask a lot of questions. Just show them to Mr. Gardner.

Q Did somebody send you from his school something that he had written?

A Yes.

Q Do you recognize the handwriting on that paper?

A Yes.

Q You have to follow specific form or we'll have

some problems.

A Yes.

Q Is that document entirely in your son's handwriting?

A Yes.

MR. WEITZ: I offer it in evidence, if your Honor please.

THE COURT: Show it to Mr. Gardner.

MR. GARDNER: I have no objection, your Honor.

THE CLERK: One document received in evidence as Plaintiff's Exhibit 13.

(So marked)

MR. WEITZ: May the witness read it, your Honor?

THE COURT: No. You read it, if you will.

MR. WEITZ: Will it be permitted to go into the jury room?

THE COURT: It's an exhibit.

MR. WEITZ: Then I'll let the jury read it. I won't read it now.

Q When were you informed of the death of your son, ma'am?

A On a Monday.

Q Who informed you of your son's death?

Haber-direct

A Officer Fehn.

Q When had you last seen him before the rock concert?

A Friday after school at four o'clock. My daughter and I picked my son up from Rockland Community College. We all had pizza together. He had gotten permission to take the day off from Brickle, to attend the concert that night.

We picked him up at four o'clock, we had pizza, and I dropped him off at a friend's house, where he was to go with his friend to this concert.

Q Was he to sleep at home that night?

A No, he said he might sleep over a friend's house, that is why I didn't worry that night, but when he didn't call me -- sometimes my son sleeps over friends' homes, but when he didn't come home he always called me the next day.

Saturday morning I was waiting for a call but I didn't get no call.

So I called a number of his friends, in fact, this one boy that I thought he had driven down to the concert with, and he told me that after the concert was over he waited outside for George and he said George didn't--

MR. GARDNER: I am going to object to conver-

sation by someone else.

THE COURT: Sustained. On a sustained objection, don't continue.

Q Did there come a time when you were informed by Officer Fehn about the death? Just yes or no.

Did he tell you your son died?

A Yes.

Q Did you thereafter go someplace to identify your son's body?

A Yes.

Q And did you make that identification?

A Yes.

Q Was Officer Fehn with you at that time or someone else?

A He came to Spring Valley, and my husband.

Q Was Officer Fehn with you when you went to view your son's remains?

A Yes.

MR. WEITZ: I don't have anything further.

CROSS EXAMINATION

BY MR. GARDNER:

Q Mrs. Haber, did you know all of George's friends?

A I think I did.

Q Did you know a Robert Levine?

A Robert Levine? The name is familiar.

Q Had you met him, do you know?

A The name is familiar. I guess I did. It's a number of years.

Q But you don't have any recollection, Robert Levine?

A The name is familiar. I mean, there were a lot of boys he knew.

Q Did you know a George Jeukit?

A Yes, I knew him.

Q You drove your son to George Jeukit's house so they could go to the concert together?

A Yes, that night, that Friday night.

Q By the way, did you ever see, or did your son ever show you a ticket that he had for the concert?

A Yes.

Q You saw that?

A Yes, I did.

Q Did you see him take the ticket with him that evening?

A I didn't see him take it.

Q Now when your son told you that night, after you had driven him to George Jeukit's house that he was

going to sleep over, did he tell you where he was going to sleep over?

A He said someone's house. He didn't tell me exactly who, because he went with a number of boys.

Q Did he tell you when you left him whose house it was that he was planning to sleep over?

A No, he didn't.

Q So when you left George at Jeukit's house you didn't know where it was he was going to sleep?

A I knew one of his friends.

Q But you didn't know which friend?

A No.

Q At least that is what George told you, that he was going to stay at a friend's house?

A Yes.

Q By the way, on that evening did George have a beard?

A He had a little goatee. I think that is what they call it.

Q Just on the bottom part of his chin, under his mouth, or up the side of his face?

A I don't remember exactly.

Q You knew your son George very well, did you not?

A I sure did.

Q When George was about fourteen was he at that time involved with-- Let me ask you straight up. When George was fourteen was he apprehended by the police for being intoxicated in public?

A I don't remember.

MR. WEITZ: May we have a direction to the jury?

THE COURT: Disregard-- A question by counsel is not evidence.

Q Were you aware at any time prior to the 29th of September 1972 whether or not George was involved with marijuana?

MR. WEITZ: If your Honor please, I am now going to move for a mistrial.

THE COURT: Take a five-minute recess.

Don't discuss the case, ladies and gentlemen.

(The jury left the courtroom, and a discussion was held.)

Q Mrs. Haber, when George was fourteen years of age did he reside with you at 12 Samuel Road in Spring Valley?

A Yes.

Q And have you heard or did you know on May 13,

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(Jury not present. The following occurred in open court outside the hearing of the jury.)

THE COURT: Will you step down and go out of the courtroom for a minute.

All right, I'll hear you.

MR. GARDNER: If your Honor please, on the counsel's attempt to additionally introduce the poem, that has now finally been re-introduced and accepted into evidence, it was the argument of the plaintiff in following up his theory, in his opening that that poem that first in his opening he was going to show the counter of George Haber and the kind of person that he was, and that also the poem was put in for an effort to show the character and type of individual he was.

It's my position, having done so he opened up the door as to the character of the decedent George Haber and any evidence this boy -- concerning her knowledge of his prior activities and prior involvement, if any, with the police department with intoxication, with drugs and with marijuana is now admissible in this Court on the issue of his --

THE COURT: Under 405A?

MR. GARDNER: That is one aspect of it, if your

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Honor please --

THE COURT: Specific instances of conduct. On cross-examination instances of conduct --

MR. GARDNER: Yes your Honor. I am sorry. I have it as 405B.

THE COURT: Read the end of 405A.

MR. WEITZ: Now, if your Honor please -- it's one thing for counsel, and I would object to this in any event. It's one thing for counsel to say on such and such a date was your son intoxicated. And having tried cases with Mr. Gardner before and knowing the estimable firm he comes from I know it's another thing -- was your son ever arrested for public intoxication. It's also interesting what apparently might be a juvenile record which is supposedly sealed and not open to anyone. Somehow or other falls into the hands of defense counsel representing the County of Nassau, a Governmental agency and police department in particular. And the rest means nothing. To ask that type of question is highly prejudicial.

THE COURT: All you have Mr. Gardner is arrest record here?

MR. WEITZ: He doesn't even have an arrest

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record.

Fourteen years of age for intoxication.

MR. GARDNER: I'll tell you what my line of inquiry will be.

Aside from the issue of conduct which I believe has now been opened, the character to which we can go into on specific instances. We have an issue of credibility, whether or not she was so advised as to prior instances of difficulties with the police authorities in the way of two intoxication detentions, one I think at 14, one at 15 and a subsequent marijuana charge that has been valid.

I have some records that indicate that in fact during the time that Mr. Haber was 15 years of age he was -- he'd been picked up on the complaint of a patrolman for public intoxication.

I intend to call the patrolman to find out whether or not the family was surprised because the boy was 15 years of age.

THE COURT: Under specific instances you can ask whether she knew that he had been -- whether specific charges with inspectors, behavior, whether she knew of such specific charges or whether she heard of such specific charges.

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According to the cases that seems to be perfectly proper, if you're not asking in a vacuum if it's in fact occurred.

MR. GARDNER: I have specific dates your Honor.

THE COURT: I think you put this witness on here to vouch for this boy's goodness and virtue and character, it's been her whole testimony about what a good little boy he was and I think you opened the door.

MR. WEITZ: Might the record reflect when you said the other day you're smiling, I think the Court's remarks reaks with a little bit of sarcasm.

THE COURT: What do you mean?

MR. WEITZ: This phrase "good little boy" was not called for in these circumstances.

THE COURT: That is the impression I have received here over the last 45 minutes.

MR. WEITZ: There is a right way and wrong way to cross-examine this lady. It's the wrong way and it's prejudicial. I am not going to cure this fellow's defects. If he wants to do it in a prejudicial manner I have my objections I assume.

THE COURT: It's proper to ask if she knew of these charges or whether she has heard of them.

Bring the jury back and bring the witnesses back.

MR. WEITZ: Of course your Honor whether these charges were true or false was immaterial.

THE COURT: There is nothing wrong with you pointing out on redirect that there is nothing to these charges, that they were dismissed. The question was whether he engaged in misconduct.

MR. WEITZ: Talking about youthful and juvenile offenses which are supposedly sealed and he somehow o. other, he's going to question this lady, woman about -- I don't know whether the charge was or even if it was the same person.

It's a disgraceful thing for him to have that type of material. he has in his possession.

MR. GARDNER: Federal rules of evidence, you have a copy yourself.

MR. WEITZ: The Court directed you to show it to me.

I have an illegible paper that seems to be something like this, and I don't know where this comes from.

MR. GARDNER: I will give you defendant's Exhibit E, 2E, 1 and E3 and F for identification and

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was marked at pre-trial conference, copies of which you didn't take or didn't request, but you certainly should have them.

MR. WEITZ: These are all juvenile records, and even on the face of it it says confidential. Now, how do these things get into the hands of defense counsel in this case?

I don't think it can be used. I don't think he has any right to them. I think it's improper for him to have them.

THE COURT: It's not a conviction we're talking about, but specific instances of conduct. This witness has testified that this young man had -- was a man of good character and had good traits of character. He is attempting to show that she is not entirely credible on that point, because he also had specific instances of conduct which aren't indicative of good character.

That is all it shows. I am not going to tell him how to do it. I am saying what is being done now is improper.

THE COURT: He can ask have you heard, or do you know that your son was involved with the police on such and such a charge. If she denies it he is stuck with the answer.

1969, that your son George was involved with the police in Speing Valley on a charge of having been intoxicated?

MR. WEITZ: Objection.

THE COURT: Overruled.

A No.

Q And when George was fifteen years of age did he reside with you at 15 Samuel Road in Spring Valley?

A Yes.

Q When George was fifteen years of age, February, 1970, had you heard or do you know that George was involved with the police in Spring Valley on a charge of public intoxication?

MR. WEITZ: Objection.

THE COURT: Overruled.

A No.

THE COURT: I ruled on your objection outside the presence of the jury.

MR. WEITZ: I know that. I just want it on the record.

Q Did you become aware or did you know that on April 14, 1972, your son George had been involved with the police on a charge of possession of dangerous drugs?

A Yes. But the case was dismissed.

Q You knew about that? You knew in '72 that he

had been involved with the police on a charge of--

MR. WEITZ: I object and ask for an instruction.

THE COURT: I will give an appropriate instruction.

The answer is "yes," you knew about it?

THE WITNESS: Yes. I did, but the case was dismissed.

THE COURT: Ladies and gentlemen -- and this falls under Rule 405 of the Federal Rules of Evidence, which I will read to you. I think you will understand in what respect it is being offered.

In all cases in which evidence of character, or trait of character is admissible on direct proof may be made by testimony as to representation, or by testimony in the form of an opinion. On cross-examination inquiry is allowed on this relevant specific instances of contact. This is what counsel is doing here, cross-examining on relevance, specific instances of conduct.

MR. WEITZ: Can we have an instruction that he asks a question it doesn't mean the facts are so.

THE COURT: I will tell them again, the fact that you ask a question, or Mr. Gardner asks a question

and there is a negative answer, anything contained in the question must be materially disregarded.

Attorneys' statements are not evidence.

MR. GARDNER: I have no further questions.

MR. WEITZ: Thank you very much, your Honor. I have no questions.

Is that last answer acceptable, that the case was dismissed?

THE COURT: Yes.

MR. WEITZ: Mr. Haber, will you take the stand.

M A X H A B E R, called as a witness, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. WEITZ:

Q Mr. Haber, are you the father of the late George Haber?

A Yes.

Q The husband of the lady who just testified?

A Yes.

Q Will you tell me, sir, how old are you?

A Fifty-four.

Q What is your occupation?

A Sewing machine mechanic.

Q How long have you been engaged in that field of work, sir?

A Started my apprenticeship when I was twelve years old.

Q Have you been working in that field, except during the time you were in the Army, for all your life?

A Yes.

Q Forty some-odd years?

A Yes.

Q How did you get along with your son, Mr. Haber?

A We had our ups and downs, but most of the time we had a very nice relationship.

Q Mr. Haber, did your son ever do anything for you?

A He always helped me.

Q In what way, sir?

A Sewing machines are heavy. He used to help me unload the car, load the car. He wasn't mechanically inclined, but he always helped wherever he could.

Q Physically?

A Yes.

MR. WEITZ: Thank you very much.

MR. GARDNER: I won't trouble you with any questions.

THE COURT: You may step down, Mr. Haber.

(The case recessed for the day.)

MR. GARDNER: Your Honor, this witness will note on pre-trial order, the non-listing of this witness' name. I have an objection for any testimony being taken.

THE COURT: Give me an offer of proof.

MR. WEITZ: That they played together, went to concerts together, that they bought gifts for the parents. That they played together, generally that he was a good brother.

THE COURT: Sustained.

MR. WEITZ: Is that on the grounds of the pre-trial order?

THE COURT: Both on the grounds and the offer that was made.

MR. WEITZ: Can we have the record show who she is, that she is the sister of the decedent?

May I know, your Honor, while my associate is calling the detective whether your law clerk has looked to see if the records that I have subpoenaed is now here?

THE COURT: He was working on it after the lunch and recess.

MR. WEITZ: You asked him to do something, I asked for the records to be produced.

THE COURT: I offered it to you to do those

things and you asked him to do certain things and I have not heard from him since. I think it's evident he has not come back in the Court.

(Whereupon a short recess was held.)

(Whereupon the following occurred after a short recess.)

THE COURT: He said he has just finished talking to Nassau County Police Department and they said that part of that file is covered by part of your subpoenas, They're about nine other documents, nine other batches of documents and your subpoenas that are not in batches of papers I had that they're still looking for. And that they are looking for, the question is do you want to take them now before you question this witness to identify those portions that are part of the documents that you have been subpoenaing?

MR. WEITZ: I think that would be in order.

THE COURT: I'll excuse the jury and we'll bring the --

MR. WEITZ: I am not sure that I understand quite what you want to say.

THE COURT: Have we not been over this conversation a week, I am repeating what I got from him a moment ago. He'll have to put on the record the facts.

THE LAW CLERK: This, Judge is a list of what is in that file.

THE COURT: Which of these papers are covered by the subpoena?

MR. WEITZ: Everything is covered by the subpoena, Judge, all books, records and everything, so there is not --

MR. GARDNER: If it's a movement for all documents and records I will move to quash it.

MR. WEITZ: I would be the -- Nassau County would be the one to quash it, I don't know what his standing is.

THE COURT: He does have standing to object. The question is which subpoena did they say this falls under the heading?

THE LAW CLERK: Mostly under that subpoena.

MR. WEITZ: Which one do they say it falls on?

THE COURT: I can't do this any other way that I know of.

MR. WEITZ: I take exception of the words they say.

THE COURT: We'll do it the other way around. I was trying to get you the documents. We'll do the best -- tell him to come in. You want him in here this afternoon?

MR. WEITZ: Yes, Judge, I can't question this man without the documents.

THE COURT: I can't make them produce the documents any faster. I am going to take another case and give this one a half day trial. Starting next week I am going to try it half day and give you a half day. It's apparent we're never going to finish this case, if you bring in this kind of number of witnesses.

I can't afford this time Mr. Weitz, I really can't.

MR. WEITZ: I am not the one that failed to come to Court without documents.

THE COURT: You have a witness here now. You have to do the best with him.

MR. WEITZ: I can't even see what is in here. I can't even see what is in here.

Can't I see the documents first?

THE COURT: I'll hand him these, let him see if these are the documents.

BY MR. WEITZ:

Q Before September 29 of 1972 were you assigned to the Homicide Bureau?

A The Homicide Squad, Police Department, County of Nassau, yes, sir.

Q And was there a custom and procedure followed by the Homicide Squad investigating the killing of human beings?

MR. GARDNER: Objection to the form of the question.

THE COURT: Sustained

Q What is a homicide, officer?

MR. GARDNER: That is not an issue in this case. I object.

THE COURT: Sustained.

Q Was there a custom and practice followed by the Homicide Squad in the investigation of the death of individuals taking place within the County of Nassau?

A There is not a custom, sir. There is a procedure.

Q Were you familiar with that procedure?

A Yes, sir.

Q Is that procedure something that is reduced to a written protocol?

A A written report. Yes, sir.

Q Procedure itself, the method of proceeding, is that a written method or a customary method?

A There is not written, sir.

Q Would you tell us what procedure consisted of in September of 1972?

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MR. GARDNER: I'll object, your Honor, how the procedure was -- how the investigation was conducted in genuine, has no relevancy to the issue of this lawsuit. There is no claim that the procedures usually followed weren't followed.

MR. WEITZ: I am trying to find out when -- if we have all the records, Judge, and I'll know when he tells me what the answer is.

THE COURT: I'll sustain the objection.

Q Officer, as part of your investigation where a gun is involved, is a search made for fingerprints?

A Yes, sir.

Q Is there a form on which such a search is reported?

A Yes, sir.

Q Is that known as a form 350?

A Maybe, sir.

Q Was such a search made in this case?

A I don't remember, sir.

Q Would you look at the record and see if they refresh your recollection.

MR. GARDNER: If your Honor please, I'll have to object to that.

THE COURT: Is there a form 350 or fingerprint report in the file you have in front of you?

MR. GARDNER: The implication that is being appropriately drawn, your Honor, those records are records that were delivered six months ago.

THE COURT: I understand that the jury knows that.

MR. WEITZ: That is exactly what I was getting at, Judge.

THE COURT: There is no record that six months ago you asked for any such record.

MR. WEITZ: I subpoenaed records for today.

THE COURT: There has been no appearance today by --

MR. WEITZ: By any records from Nassau, City. I have the Judge's --

THE COURT: The County is under instruction to bring in the record. Then you may proceed with the questioning of this man.

MR. GARDNER: If your Honor please, I have to object to the form of the purported request.

THE COURT: I'll tell the jury this much, this work should have been done a year and a half ago by the plaintiff. He hasn't prepared his case and that is the reason we're going through this part of the case. Now, go ahead.

MR. WEITZ: If your Honor please, in light of

what your Honor just said I want to show the Court plaintiff's Exhibit 12 for examination which was used at the pre-trial conference which specifically refers to such a form being attached and it's not -- and when I tell the Court there is records asked for, that were not furnished to me that is the reason I handed up to your Honor, there is records in that exhibit that were to be attached which weren't attached.

THE COURT: If you didn't do your homework --

MR. WEITZ: Are we playing a game?

THE COURT: YMu have nobody but yourself to blame. Do not attempt to put the blame on this Court of anybody else.

Proceed. You want me to take appropriate action with respect to you?

MR. WEITZ: I'm waiting to see if form 350 is in those papers.

THE COURT: There is no obligation on any part to show the case. You mark anything you want as an exhibit in form of examination.

THE LAW CLERK: Two page document marked for identification as plaintiff's Exhibit 14.

* * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

HABER, :

Plaintiff :

-against- : 73 C 1408

NASSAU COUNTY, :

Defendant :

----------x

United States Courthouse
Brooklyn, New York

May 3, 1976
9:30 o'clock a.m.

B e f o r e :

HONORABLE THOMAS C. PLATT, U.S.D.J.

MOTION

RAYMOND P. STALKER
ACTING OFFICIAL COURT REPORTER

Appearances:

HARVEY WEITZ, ESQ.
Attorney for the Plaintiff

JOHN GARDNER, ESQ.
Attorney for the Defendant

THE CLERK: Haber against Nassau.

MR. WEITZ: If your Honor please, I have been informed that the records that had been subpoenaed have not been returned to this courthouse. I've asked Officer Fenn about it. He says he has none of those records. The Clerk was called -- has called the office downstairs, the records office downstairs. I understand they are not here and I've spoken to Mr. Gardner and he says he has no such records.

I wish to call to the Court's attention Plaintiff's Exhibit 12 for identification, Detective Fenn's report, and specifically I wish to call to the Court's attention, in my copy it is illegible, but I believe it's page 5, in which the report states the following persons were interviewed and questioned and statements were taken by the Assistant District Attorney Dillon. The next line is the significant line. copies are made a part of this record. It also has the persons listed, for example, Marsha Cohen, 8800 Shore Front Parkway, et cetera.

Without these records and statements, the plaintiff's position in this case is materially damaged and I wish to offer those statements in evidence I think the County of Nassau has had ample time in which to respond to this subpoena.

MR. GARDNER: May I respond, if your Honor please?

THE COURT: I will ask my Clerk first.

LAW CLERK: They called after I had spoken with them. They said they are going to call the firm of Bower and Gardner to see if they had supposedly misplaced them and do their best to deliver them here by Friday. That was on the phone, it was a message, and I have not heard from Nassau County other than that, since I spoke to them Thursday afternoon.

THE COURT: All right, Mr. Gardner?

MR. GARDNER: Mr. Weitz, may I see the subpoena? I would submit to your Honor that the subpoena in the broad language in which it was issued does not call with any degree of specificity the question and answer documents that Mr. Wietz now claims that he subpoenaed.

THE COURT: He asked for the files. If they are not here, Nassau County should be here and give us an explanation.

MR. GARDNER: As far as those, I have duplicate copies of the questions and answers on the witnesses that Mr. Weitz has just referred to, so I do have copies of those.

THE COURT: Why don t you give them to him?

MR. GARDNER I have no objection.

THE COURT: Well, give them to him.

What else do you want, Mr. Weitz?

MR. WEITZ: May I have a moment to make sure now that we have those three items? Mr. Gardner, do you have any internal investigative or disciplinary investigation report relating to this matter?

MR GARDNER. I have no idea what you mean by internal department or disciplinary action. I have no idea --

MR. WEITZ This police officer testified last Thursday that Sergeant Salmeyer was interviewed by a superior officer concerning this incident.

This police officer said he would have no authority to take a statement from the agent, but the superior officer and he mentioned a number of names, Lieutenant Dempsey, I believe was one of them. He interviewed Agent Salmeyer, I believe was one of them. He interviewed Agent Salmeyer.

MR. GARDNER: If your Honor please, I have no idea as to whether or not any such report was submitted in writing or any writing relevant thereto. We had contacts with the department and are still maintaining a search and they said if any one exists they would produce it. I can't do any more than that,

your Honor.

MR. WEITZ: I think they were bound to comply with the subpoena.

THE COURT: They are. If one doesn't exist how are you going to compel them to produce it?

MR. WEITZ: If your Honor pleases, I think the witness testified that --

THE COURT: I don t know whether it is in writing. All he knows is a superior officer did interview Mr. Salmeyer. He has never seen any such writing. He has testified tha such a writing exists

MR. WEITZ: I think I will lay the foundation for it in a very short while.

THE COURT: You can lay the foundation. There are two things that I see that can be done if these documents are not produced in evidence. I will do them if you wish. I will declare a mistrial and I will fine the County because of the trial and the jury, if you can establish they haven't produced a document in compliance with the subpoena.

MR. WEISS: If your Honor pleases --

THE COURT: I will do so if it is shown to me to be a wilful failure to comply with a subpoena.

MR. WEITZ: There is a form, 350, that I subpoena. It's not here.

THE COURT: Mr. Gardner, do you have that?

MR. GARDNER: If you recall, your Honor, at the last trial date, which was Thursday of last week, certain documents were requested and we made contact with the department to establish whether or not these documents existed and if they were to make arrangements to have them here. One of those documents was the form 350. We made contact and we haven't located the 350. I don't know if it exists.

THE COURT I believe the witness testified that it did exist.

MR. GARDNER: If he so testified, then we'll produce it. They're still looking for it.

THE COURT: I'm going to entertain Mr. Weitz's motion. You heard the motion that I said I would entertain as to that document which we know exits. I will entertain the motion.

MR. WEITZ: If your Honor pleases, I think the Court will fully anticipate I was going to make such a motion and I would move and I do now move for a mistrial

THE COURT: And do you move that a fine be imposed upon the County of Nassau for each and every day of the trial?

MR. WEITZ: I certainly do, Judge.

MR. GARDNER: If your Honor pleases, we made arrangements to have those records searched for. That is any documents within that subpoena to be produced even so much as having Sergeant Salmeyer go down there this morning to pick them up. He was advised they were going to be produced here today.

THE COURT: They are not here.

MR. WEITZ: I anticipated if they --

THE COURT: I don't think we can so anticipate. You were given adequate notice I believe last Thursday that these documents were going to be required We wasted a good portion of Thursday afternoon because the documents were not here. You had all day Friday to produce them and all weekend and I let it be known if these documents were not produced I would take the appropriate action and I'm going to take the appropriate action.

MR. WEITZ: I have the admission on the subpoena, Judge.

THE COURT: The subpoena was served on April 27th and was acknowledged recieved by the Records Division of the Police Department on that day. That among the documents specified was Form 350.

MR. WEITZ: We selected a jury on April 28th.

THE COURT: This is returnable on the 29th.

We couldn't expect him to return it before that day.

MR. WEITZ: They were given more than adequate notice, Judge

THE COURT: Yes. I will do it any way you suggest, Mr. Weitz. I will comply with your request for a mistrial in the event if this is your desire.

MR. WEITZ: It is, Judge.

THE COURT: And I'll give the County an opportunity to come in here and offer whatever explanation they deem fit within say the next 24 hours before imposing a fine for the inconvenience it has caused us.

MR. WEITZ: I do press for the fine. I know it's not going to come to the plaintiff, but I think it is appropriate under the circumstances.

THE COURT: I can't help but agree.

MR. GARDNER: If your Honor please, I am sure an explanation exists and I anticipate that material, if it does exist, would be produced here today.

THE COURT: It doesn't excuse the failure of the County to appear and explain the absence of these records, if nothing else. Even if it doesn't exist, failure to appear on the 20th day of April, last Thursday at 9:30 to explain the absence of the records. It does not excuse the failure to call my chambers on

Friday and explain what was the situation as they said they would do. It doesn't excuse their failure to appear today.

MR. GARDNER: It was my understanding the records would appear as I have indicated to your Honor --

THE COURT: But they are not here. There is no one from the County of Nassau and you apparently do not purport to represent the County, or do you?

MR. GARDNER: No, I do not, your Honor. I will call and make a request and make whatever arrangements I can make to have them here.

THE COURT: You better let them know they're facing a fine and this is going to --

MR. GARDNER: I'll so advise them.

MR. WEITZ: You see, Judge, I try to avoid making judgmental or prejudicial statements. I'm just going to state my own situation as an advocate. I feelll in my hands in part I have been hamstrung in presenting the evidence in this case by the failure of the Department to comply with the subpoenas

THE COURT: To that extent --

MR. WEITZ: I do.

THE COURT: I'm going to grant it to you. You may on reflection wish to ask for a continuance and a fine, which I'll give to you. That is if you wish.

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I'm going to penalize the County of Nassau for their failure to comply with the subpoenas unless there is an adequate explanation. I'm certainly going to give you a continuance. I can excuse the jury until tomorrow or Wednesday and we can pick up again. if it is your desire.

MR. WEITZ: If your Honor please, I prefer a mistrial. I know the Court's schedule and I don't want to end up trying this case on half-days. It is a financial hardship for me and I know I will suffer financially by a mistrial. I would much rather have a smooth trial. I don't want to do this but I have a client whose interests are paramount to mine and I would rather present this case in a smooth, orderly way. I'm asking for the declaration of a mistrial, Judge, and I do press for the other part as well, the fine against the County.

THE COURT: Do you wish to make a telephone call?

MR. GARDNER: It's being made now. I sent out one of my associates.

THE COURT: Mr. Weitz, I will state on the record, but I want you to come up here, Mr. Gardner.

(The following occurred at side bar.)

THE COURT: I don't like saying this in front

of your client, but perhaps I even should. But, what bothers me about giving you a mistrial is not that you're not entitled to it, but you may have some difficulty getting on trial again for some period of time.

MR. WEITZ: Judge, I'll do my best --

THE COURT: It's not a question of doing your best. It's a question of my being available to give you time.

MR. WEITZ: Of course my thoughts are only my own as far as the way the case should be presented. I have some difficulty with Mr. Gardner and the Court, but I think it is important, the manner in which the case is presented and if it is delayed by a mistrial, which I feel is necessary as a lawyer, because this trial has been completely disrupted and I found I am floundering half the time because I haven't had time to ask these questions. I had to put on a witness I think that was unfair to hear out of turn without preparing her. There are three people I would like to put on the stand and put these things in evidence. I think they are essential to my client's case and I think here interest would be better served by a mistrial.

MR. GARDNER: If your Honor pleases,

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Officer Barry has just walked into the courtroom. He indicated he has brought the material in response to plaintiff's subpoena. He had difficulty getting here in time, it was in terms of traffic. Otherwise he would have been here earlier. He's in the courtroom if the Court wants to ask him something? I apologize on behalf of the county and for my client for any delay that the traffic may have caused the patrolman in getting the records here this morning. I did make arrangements with Sergeant Salmeyer to attempt to pick them up earlier and apparently they wanted a separate courier since he was a party and I have no other explanation I could make for the delay, your Honor.

THE COURT: I would like to put him on the witness stand.

MR. WEITZ: Yes, sir.

(continued next page)

(Jury not present.)

D E N N I S B A R R Y , called as a witness by the Court, after having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

THE COURT: Mr. Barry, you are associated with the Records Bureau of the Police Department of Nassau County?

THE WITNESS: No, sir.

THE COURT: What is your function?

THE WITNESS: I am with the Legal Bureau of Nassau County Police Department.

THE COURT: Are you aware of the fact that the Police Department was served on April 27th for the subpoena which has been marked as Exhibit 14 for identification?

THE WITNESS: Yes, sir.

THE COURT: Do you see the return date on that subpoena?

THE WITNESS: Yes, sir.

THE COURT: Can you give me an explanation as to why it wasn't complied with on last Thursday?

THE WITNESS: I believe there was a good-faith mistake involved here. We believed that the information had already been supplied on a prior date and the

attorneys were in possession of the requested material.

THE COURT: That doesn't excuse the failure to appear in this court, does it?

THE WITNESS: No, sir.

THE COURT: And there was no appearance by Nassau County last Thursday morning, was there?

THE WITNESS: Not to my knowledge. I believe there was a detective from the Homicide Squad.

THE COURT: Not with any records. There was a detective who separately appeared under a separate subpoena, but this was not compliance with that subpoena. Isn't that correct?

THE WITNESS: The only information I can give is that we assumed that this material had previously been supplied. We were in contact with the County Attorney on this and we were referred to Bower and Gardner and efforts were made over the last two days to determine the extent of the material which had been previously supplied.

THE COURT: You realize when you failed to comply with the subpoena there are certain penalties attached. You realize, for example, the better part of Thursday the plaintiff's attorney was disrupted in his presentation of his case to a jury and the result has

been that this Court and the jury has been kept waiting for I would say at least a half a day by reason of, I can't help but characterize it as either gross negligence or willful failure to comply with the subpoena at or at least appear here and explain or ask the appropriate questions. Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: Do you wish to ask him any questions, Mr. White?

MR. WHITE: No.

EXAMINATION

BY MR. GARDNER:

Q Officer, when that subpoena was received -- subsequent to the receipt thereof, were communications had with the Court, was there not, concerning questions as to whether the material had been supplied?

A Yes, there had been.

Q And following that discussion, there were discussions between your department and the County attorney as well as between your department and my office, Bower and Gardner; is that correct?

A Correct.

Q That was Thursday afternoon and Friday?

A Thursday and Friday.

Q Were the records searched in order to comply with the subpoena?

A It wasn't until Friday evening that we were actually in knowledge that there was a deficiency in the records that were actually supplied.

Q You mean Friday?

A This must have been approximately four, four thirty.

Q In response to that subpoena, you brought all the material in existence within the Department to the Court today?

A To the best of my knowledge, that is everything in existence, it is the whole homicide trial.

Q Officer, would you please explain to his Honor the reason you arrived in court at approximately ten o'clock, that you walked in, five minutes after ten?

A The only explanation is traffic delay. We left, it was twenty after eight and it took us that long to get from Mineola to Brooklyn.

MR. WHITE: May I ask one question?

EXAMINATION

BY MR. WHITE:

Q Officer, would you tell us what material you brought in accordance with that subpoena?

A We have brought the entire homicide investigation file. It contains everything that the Police Department has in this matter.

Q Contains every report that the Police Department has in this matter?

A Yes, it does.

Q That is the file that the young lady at the table is now going through?

A Correct.

Q You have turned it over to Mr. Gardner?

A These are the originals --

MR. WHITE: If your Honor pleases, may I have an opportunity to look at them now?

THE COURT: Yes.

You may step down.

THE WITNESS: Thank you.

(Witness excused.)

(continued next page)

(Time noted: 12:00 o'clock noon.)

(Jury enters box.)

THE COURT: Ladies and gentlemen, I think we are ready now.

D R . M I N O R U A R A K I , called as a witness in behalf of the Plaintiff, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WHITE:

Q Dr. Araki, have we ever met before today?

A No, we have not.

Q Dr. Araki, are you appearing here pursuant to subpoena that was issued by my office calling for your appearance?

A Yes.

Q Doctor, would you tell us by whom you are employed?

A County of Nassau.

Q And in what capacity, sir?

A As Deputy Chief Medical Examiner.

Q Are you a Doctor of Medicine?

A Yes.

Q For how long have you been employed by the County

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of Nassau as a Deputy Chief Medical Examiner?

A As a Deputy Chief Medical Examiner, for the last three years.

Q Prior to that, were you in the employ of the County of Nassau?

A Yes, I was.

Q In what capacity?

A As a Deputy Medical Examiner.

Q For how long have you served in that capacity, sir?

A Twelve years.

Q Now, in the course of your official duties on behalf of the County of Nassau, did you participate in the autopsy performed on the late George Steven Haber?

A Yes, I did.

Q Do you have a copy of that autopsy with you, sir?

A Yes, I do.

Q Do you have an independent recollection of that autopsy or would you refer to the notes to tell us what happened?

A At this point I would have to refer to the notes. There are a lot of cases that have passed since that time.

Q Doctor, might I see the notes that you brought with you?

A Sure.

MR. WHITE: May I, your Honor, for just a moment?

THE COURT: Yes.

(Pause.)

Q Sir, this is a photocopy of the official report in connection with this autopsy?

A Yes, it is.

MR. WHITE: May we have it marked for identification?

THE COURT: Yes.

THE CLERK: Medical report received as Plaintiff's Exhibit 16 for identification.

Q Now, Doctor, before I ask you about the details of your report, would you be good enough to tell this jury, in general terms, when you were called upon to examine the body of someone who has died, just in general terms, what do you do? What does your examination consist of?

A Well, that depends on the situation, of course.

Q All right, let me make it more specific: In a situation where somebody has been shot, what does the examination consist of?

A The examination consists of several parts. The first series of examinations is done if there is a scene of the shooting itself. The body is examined there. We take charge of the body and we then have the body brought to the morgue.

The second series of examinations done refers to

our type of examination which includes X-rays of the body.

Q Did you say X-rays?

A X-rays of the body. Photos of the body. This is an external examination, and following that the autopsy as such.

Q When you say autopsy, Doctor, will you define that for us in layman's terms; what is an autopsy?

A It is the opening of the body to examine the organs within that body to see what actually caused the death.

Q Now, Doctor, in this case, did anyone from the Medical Examiner's Office go to the scene of the shooting?

A No, they did not. Since the body was removed to the Nassau County Medical Center before we were notified.

Q Is it usual for a body to be removed from a scene before you are notified?

A That again depends if the body is deemed dead at the scene and has been pronounced dead at the scene. Then we will proceed. We will be notified and we will proceed. If the body -- if there is any chance that the body is alive at the scene it is transported to the nearest medical facility for whatever treatment can be given.

Q Now, Doctor, did anyone, to your knowledge, from the Nassau Medical Examiner's Office, examine Mr. Haber at the Medical Center, the County Medical Center?

A No. However, we are on the ground of the Nassau

Medical Center.

Q Is that where your office is located?

A We have a building there, yes.

Q And when you ask for a body to be taken to th morgue, where is the morgue located?

A The morgue, which morgue are you speaking of?

Q Well, let's say specifically with respect to late George Haber. Where was his body taken?

A From the Emergency room to our morgue.

Q Where is that?

A That is within the Medical Examiner's building in the Nassau County Medical Center complex.

Q Now, were X-rays taken of George Haber?

A Yes, they were.

Q Do you have a report of those X-rays?

A No, I do not.

Q What part or parts of the body were X-rayed; were any taken to see if there were broken bones or fractures?

A No.

Q What part or parts of the body were they taken, were they taken?

A We took X-rays to look for foreign bodies. Bullets, whatever.

Q Do you know what happened to those X-rays?

A They are in the morgue.

Q You did not bring them with you?

A No, I did not.

Q Did you look at them before coming here?

A Yes.

Q Doctor, would you tell us what parts of the body in this case they were taken, those X-rays?

A Of the chest.

Q No other area?

A Not that I can recall at this time.

Q And, Doctor, I noticed that amongst your reports you have some drawings of some sort. What are those drawings that you have?

A These drawings are our worksheet in terms of locating and identifying the various entrance and exit wounds of the body. Also to give us an insight as to where they are located in terms of the body.

Q Now, Doctor, photographs were taken as well of this young lad?

A Yes.

Q You don't have those with you, right?

A No, I did not bring them.

Q I believe we have them. I will show you some photographs in a little while.

Now, Doctor, did you conduct an external examination of this young man?

A Yes, I did.

Q Would you tell us what findings, if any, there were on the external examination? Doctor, may I interrupt you to explain words as you go along?

A Certainly. My external examination reads as follows: Deceased, a well-developed, well-nourished young white male adult, measuring 5'9" in length and weighing 158 lbs.

Q Can I stop you for a minute?

A Yes.

Q Is that approximate weight and height?

A No, this is the exact weight and height.

Q And was that his height and weight when he was living?

A That was the height and weight when he arrived at the morgue.

Q Would there be any difference between that and what he weighed and how tall he was when he was alive?

A It depends on how much blood was lost and so on. Plus or minus a couple of pounds.

Q Well, assume plus or minus a couple of pounds, fine.

Doctor, will you continue, please?

A The hair is dark brown. The eyes are brown. The nasal passage is patent.

Q What does patent mean?

A Open.

The nasal septum is approximately in midline and is intact.

THE COURT: You have to keep your voice up. I don't think everyone can hear you. Keep your voice up so they can hear you.

A The mouth contains natural teeth. There is a beard over the chin. The neck is palpated, no masses are felt. Left chest has bullet wound of entrance surrounded by powder burns just below the nipple and just laterally to it.

Q Now, Doctor, please let me stop you there for a minute. What do you mean by powder burns?

A In a gunshot wound of a relatively close nature, the powder charge that propels the bullet also comes out and since it is hot it will tattoo the skin.

Q Doctor, I want to show you Plaintiff's Exhibit 11 in evidence and ask you whether those burns are seen on that photograph?

A Yes, they are.

Q Was that the dark area?

A It is the dark area surrounding the central hole

that you see.

Q Could you mark that for us on that photograph, Doctor?

THE COURT: Do you want a red pencil?

THE WITNESS: May I, please?

A Counsel, are you asking that the powder burns be --

Q May I ask you this: Is there something other than powder burns shown on that photograph?

A The opening, the entrance wound is also there.

Q Before you mark the photograph, and to clarify this, this dark area that I have my finger on, is that the powder burn or is that the wound or both?

A It is the powder burn and the wound, both.

Q The wound is located inside that area, is that it, Doctor?

A I could pinpoint it for you if you wish.

Q Is it possible to do it?

THE COURT: Draw an arrow and mark P for powder burn and draw another arrow and mark it W for wound.

MR. WHITE: I have a simple way to do this.

Q Doctor, I am going to show you this photograph. Is that a view of the deceased?

A Yes, it is.

Q Would it be possible for you, on one, to mark the

powder burns and on the other to mark the area of the bullet wound entrance? I am asking you if it can be done.

A Yes.

MR. WHITE: If your Honor please, I might offer this photograph in evidence?

THE COURT: Yes?

MR. GARDNER: No objection.

THE CLERK: One photograph received in evidence as Plaintiff's Exhibit 17.

Q Doctor, on Plaintiff's Exhibit 17, will you mark the wound and on Plaintiff's Exhibit 18, would you show us the powder burn?

A W for the wound --

MR. WHITE: May the record indicate that the doctor has put a W for wound. PB for powder burn.

Q Doctor, based on your experience as a Medical Examiner, what is the cause of the powder burn; would you tell us?

A The cause of the powder burn is the powder that is propelled by the pellet, bullet, in close proximity to the skin, when the gun is fired, if the gun is close to the skin it will leave a burn. This is because the powder is hot as it is discharged.

Q Now, there are other things other than powder

burns that are discharged from a gun when it's fired, if you know?

A Yes.

Q What else is discharged?

A Various chemicals. These are all part of the powder. There are little bits of dirt that happen to be in there. There are also pieces of metal that may break off from the cartridge.

Q Doctor, in addition to this material being discharged from the muzzle, do other things come out of the weapon as well, cylinder, gases and powder?

A Yes, it does.

Q And, Doctor, was there any -- anywhere else that you found any such burns or residue on this young lad's body?

A Yes.

Q Where else did you find it, sir -- may I direct your attention?

A The upper extremity shows powder burns on the flexor surface of the forearm. Flexar means the inner surface of the left forearm.

Q The uppar extremities show powder burns on the flexor surface of the left forearm; would that mean you examined both extremities and you found only burns on the left forearm?

A That's correct.

Q When you say upper extremities, would you be good enough -- does that include the shoulder?

A From the shoulder --

Q Shoulder down to the fingers?

A Right.

Q And are you experienced in examining the body for these traces of gunpowder and burns?

A Yes, I am.

Q Now the flexor surface of the left forearm, that is the only place you found the powder burns on the extremities. This is from the fingertips to the shoulder. Would you be good enough, Doctor, to hold up your left arm and show us where that is?

A This is the flexor surface.

(Witness indicating)

Q Some place between the inside of the palm up to the elbow; is that correct?

A That's correct.

Q Can you tell us where in that area you found those burns, Doctor, what part of the flexor surface?

A As I recall, it was somewhere in the middle portion of it. Middle to lower third, or the wrist third.

Q If somebody were holding -- be good enough to

hold your left hand this way --

MR. GARDNER: If your Honor please, this is highly suggestive. If it is the contention that Mr. White is holding someone's arm --

THE COURT: Sustained.

MR. WHITE: I will ask another question.

Q Doctor, the normal anatomical position of one's arm standing in an erect position is the flexor surface against the body, as I stand here now, is the flexor surface next to the body, my left arm against my body?

A Yes, it is.

Q In an upraised position of the arm, is the flexor surface facing forward --

MR. GARDNER: I'm going to object, if your Honor please. There is a foundation.

MR. WHITE: I will withdraw it.

MR. GARDNER: To indicate any foundation upon which an answer can be given --

THE COURT: He has withdrawn it.

MR. WHITE: I have withdrawn it.

Q Doctor, would you continue? What else, if anything, did you find on your external examination of this young man?

A The abdomen was free of identifying marks and

scars. The external genitals were noted as that of an adult male. Lower extremities were unremarkable.

Q Unremarkable?

A There is no --

Q Nothing.

A Nothing, negative. The upper extremities show the powder burns as I have previously stated. There were assorted abrasions of the dorsum of the right hand. Dorsum meaning the back of the right hand. With small areas of echymosis, meaning small areas of hemorrhage surrounding the abrasions.

In the inner surface of the right arm there were assorted scattered abrasions. This is the right arm, not the forearm.

Q Where is that on the upper surface -- I mean in the inner surface?

A Inner surface of the right arm. There were scattered abrasions here and there.

Q That means above the elbow and below the armpit; is that correct?

A That's correct.

Q Sir, what else, if anything, Doctor, did you observe on the --

A And finally on the back, on the right side there

is a wound of exit to be described later in the wound tracks.

Q Now, Doctor, I show you a photograph and ask you, sir, is that a photograph depicting the exit wound?

A Yes, it is.

Q Is that a photograph taken by yourself?

A No, it was not. This was done, I believe, by the --

Q Homicide Squad?

A Well, at the Homicide Squad's direction.

MR. WHITE: I offer this in evidence, your Honor.

MR. GARDNER: If your Honor pleases, I am going to object on the basis that the purpose of showing a color photograph is nothing more than to prejudice the jury. It serves no purpose. I am sure there is some other photograph that could indicate the wound, if it is that material, which I don't think it is.

MR. WHITE: I have another photograph. I will withdraw the offer. There is a large photograph here. It may serve the same purpose.

MR. GARDNER: I would submit, if your Honor please, that the doctor can describe from his report, it is clearly in there where the entrance wound was and the exit, and there is no necessity to burden this jury with pictures of the deceased. I submit to your

Honor you will find that those pictures, if they are offered, they are only intended to inflame passions from the jury.

MR. WHITE: Does this show the exit wound, Doctor?

THE WITNESS: Yes, it does.

MR. WHITE: May I have it marked for identification at the moment, your Honor?

THE CLERK: One photograph marked for identification as Plaintiff's Exhibit 18.

(continued next page)

Q Doctor, I show you this photograph and ask you to look at it and ask you if it is a fair and accurate photograph of the appearance of the condition of the decedant's face at the time you examined and found certain things with respect to his face; will you look at your report?

A Yes.

MR. WHITE: May I have that marked for identification? I offer both of the photographs in evidence.

THE CLERK: One photograph marked for identification as Plaintiff's Exhibit 19.

MR. GARDNER: No objection, your Honor.

THE COURT: They will be received in evidence.

THE CLERK: Plaintiff's Exhibits 18 and 19 received in evidence.

Q Now, Doctor, I don't know if you used the right term, a bullet in the young man's body --

A No, I did not.

Q That wound on the back, did that indicate that bullet had entered the one place and left in another pl ce; is that it?

A The wound -- the back, this is the exit wound, yes.

Q And, Doctor, does that mean that this bullet,

that entered in one track, in one place, traveled through some portions of his body?

A Yes, they did. Yes, it did.

Q Would you tell us the path that this bullet took through this young man's body?

A That is described in the section wound and wound track. Wound of entrance is located in the left chest, 49 3/4 inches above the left heel and five and one-quarter inches to the left of the midline.

Q Midline being down the center of the chest?

A The exact center of the chest. The wound measured three-eights of an inch in diameter. Edge of the wound are slightly inverted and reddish.

Q Meaning what, inverted?

A Punctured inward. The edge of the wound are slightly inverted and reddish-black in color. There is a tattoo of powder burns surrounding the wound of entrance. The tattooed area measured 2 5/8 inch in overall diameter. The wound track orients from the left to the right, towards the posterior plane.

Q What does that mean, what is the significance of that?

A From front to back and from the right -- I'm sorry, from the left to the right.

Q Is there any significance to that? Does it indicate in which direction?

A The path here is an oblique path, not straight. Not straightforward, to the back or from side to side.

Q Can you tell us, from that direction, in which direction the muzzle of the gun was pointed at the time it was discharged?

A Generally, yes.

Q And what is that, what direction?

A The muzzle was pointed from the left towards the right side. From the front to back. If you letme continue, I will tell you the exact degree of variance from the anterior to the posterior.

Q Fine, would you do that, Doctor, please?

A Right. If you consider that the track is going straight from the front to the back, it is a 90° angle. At this particular track -- this was from -- it is 60° from a 90°-angle. If you follow what I mean.

Q I do.

THE COURT: It is oriented in an upward plane about ten degrees? In other words, the muscle was pointed slightly upward in terms of the body, in terms of the upward meaning the head being up and the feet being down?

MR. WHITE: I understand.

THE WITNESS: Not in reference to the surrounding area or surrounding scenery.

Q All of these degrees are in terms of the body?

A Oriented only to the body. The wound track is through the skin and subcutaneous tissues. This is here to indicate the fatty layer under the skin of the left chest through the fibrous pectoral major muscle. That is the muscle of the anterior chest or front part of the chest. It enters the left thoracic cavity. That is the space in which the lungs are present and the heart, at the level of the sixth interspace. Now the sixth interspace is the space between the sixth and seventh rib.

Q Counting the ribs down, counting down from the top, Doctor?

A Always from the top downward.

Q And the collar bone is not considered part of it?

A There is one rib under it, though.

Q Just under it, that is the first, and you count down?

A That's right.

Q Now, did it strike any of the ribs, Doctor?

A Nicking the lower part of the sixth rib. There is a through and through wound of the interior segments of the left upper lobe.

Q What does that mean?

A The left lung has two lobes, upper lobe and lower lobe. It is just two portions of the lung.

Now, the upper portion of that lung, of the left lung has a through and through wound.

Q I think the next --

A The next pertains to the pericardial fat or the fat that surrounds the heart, and this penetrated the apex of that triangle, how the heart is roughly shaped.

Q What is the apex? Top or bottom?

A Very tip of the heart.

Q Top?

A The very tip. Most lateral portion of the heart.

Q Did it actually enter the heart, Doctor?

A It did enter the heart. It entered through the left ventricle or the left lower chamber of the heart at the apex and it passed through the left ventricle. That is the space itself and through the valve between the left upper chamber and the left lower chamber.

Q Of the heart?

A Of the heart. In the process of passing through that valve, it nicked the leaves of that valve. It entered the left atrium.

Q Is that still part of the heart?

A This is the upper chamber of the left heart, left side of the heart. It exited the left atrium, adjacent to the pulmonary veins which are returning blood that had been sent out to the lungs for aeration and oxygenation.

Q Where did it go from there, Doctor?

A It then entered the right lung into the bronchi, where all of the vessels of the main bronchus are, it entered that lung. It exited the lung at the lateral portion of the right upper lobe. This is the inferior segment. It passes out of the right thoracic cavity or the right chest and posterior axillary line. This is the line that is an imaginary line at the back of the armpit.

Q Going laterally?

A Downward.

Q Downward?

A Downward. And the exit was through the fourth interspace, space between the fourth and fifth ribs.

Q That would be two ribs higher than where it entered; is that right?

A And in the process it nicked the upper margins of the fourth rib. The wound of exit is located fifty-five inches above the right heel and six and one-half inches to the right of the midline. The wound of exit measures one-quarter by one-eighth of an inch.

Q Doctor, did you ever see the bullet that passed through this young man?

A No, I did not.

Q Did you examine the internal organs of this young man?

A Yes, I did.

Q And I will ask you just generally, with respect to the heart, was it a normal heart other than what happened to it from the bullet passing through it?

A Yes, it was.

Q And were his lungs normal, other than the wound that had been suffered by the bullet passing through it?

A Yes, it was.

Q You examined his thyroid, his larynx, were they all normal, Doctor?

A Yes, they were.

Q What about his liver, was that generally in a normal condition, Doctor?

A Yes, it was.

Q And the spleen is normal?

A Yes.

Q The stomach was normal, Doctor, the gastro-intestinal tract?

A Yes.

Q And, Doctor, would it be correct to say that as far as his internal organs were concerned, they were in generally normal condition for a young man of his age?

A Yes.

Q Now, Doctor, did you examine his head?

A Yes, I did.

Q And I would ask you to direct your attention to the examination of this young man's head and tell us what you found when you examined his head?

A The lacrimal is incized meaning the skull is --

Q Incized meaning cut?

A Cut, yes.

Q Was that done by you?

A That was done by me in order to examine the inside of the skull. There is a small area of hemorrhage into the --

Q Doctor, it says it was reflected; what does that mean?

A Meaning the cuts were made and the skin and scalp pulled over to say -- well, there is better exposure for us to examine what we have to examine.

Q In other words, you peel away his scalp to look at it?

A That's correct.

Q Tell us what you found when you peeled away the scalp.

A There was a small area of hemorrhage into the scalp in the frontal area just to the right of the midline.

Q Is that consistent with a blow having been delivered to the head, Doctor?

A There is a laceration of the scalp.

Q Are those two findings consistent with blows being delivered to the head?

A Yes. It could be. Well, let's put it this way, it is consistent with a blunt injury to the head.

Q Blunt injury and laceration?

A No, the laceration is a tear in the scalp itself. This is a laceration of the skull.

Q And how big was that laceration, Doctor?

A It measured 1 1/2 inches in length.

Q Where was the blow located, Doctor?

A In the frontal area just to the right of the midline and just posterior or just into the hairline.

Q Doctor, would you mind pointing on yourself where that might be?

A My head is a little receded. If normal -- it should be here, just to the right side of it and into the hairline.

Q More to the top of the head?

A Well, it is in the frontal area.

Q Frontal, but inside the hairline?

A Inside the hairline. If you refer to the pictures here, you will see where his hairline is. It is a little further forward than yours or mine.

Q Is that laceration shown on the photograph?

A You cannot see it. It is into the hairline.

Q Did you observe anything else on his head, Doctor?

A We opened the calvarium, which is the skull. We made our saw cuts and opened and examined it and found no fractures of the skull.

The cerebral spinal fluid, that is the fluid in and surrounding the brain was found to be clear and colorless.

The vessels over the cerebrum are slightly dilated and congested.

Q What do you mean by that?

A In most instances where we examine people in the condition that we do, we find them slightly dilated and congested.

Q Is there any significance to that?

A No, there is not. The gyri, that is the convolutions of the brain and dips are natural. We made

multiple sections through the cerebral hemispheres and we failed to retrieve any areas of softening or hemorrhage into the brain.

Q Doctor, let me interrupt you for one minute. Is there anything remarkable or significant about the balance of the findings with respect to the head?

A No, there isn't.

Q Now, Doctor, did you in addition to that -- was there a microscopic examination performed?

A Yes. That is routinely done.

Q Doctor, I am just going to ask you about this. Please skip all of these here, which you said were unremarkable and if you take them in order, let me see, heart, hemorrhage, this is bleeding in the heart and lung, pulmonary congestion, hemorrhage, there was bleeding, as well as from the gun shot wound, mild congestion, is that a result of the condition of the body at that point?

A Yes, more or less.

Q The pancreas, is that because of death, is that right?

A The pancreas, as you know, produces all of the enzymes or all of the juices that are necessary to digest our food, and of course when we die the juices then escape into the tissues of the pancreas and it starts digesting it.

Q And those are the changes --

A Those are the changes that we see, yes.

Q How about congestion in the hydranals?

A No special significance.

Q And the bone marrow?

A Hemopoiesis is the bone marrow that actually produces red blood cells and white blood cells and platelets that are necessary to the body.

Q Now, Doctor, in addition, was a toxicology report done?

A Yes, it was.

Doctor, did you examine the lip, teeth, brain, kidn , stomach contents, teeth swabbings, did you do that, Doctor?

A I took those various specimens and submitted the specimens to our toxicology laboratory.

Q Would you tell us, Doctor, on the first line of your findings, carbon monoxide present, .5 per cent?

A That is hemoglobin saturation.

Q Is carbon monoxide in the blood?

A Yes.

Q How does carbon monoxide get into the blood, Doctor?

A In terms of carbon monoxide, there is present

carbon monoxide outside, especially around roadways and parking lots or around any place that cars are being -- automobiles are being used.

Now, one of the features of carbon monoxide is that it has approximately one hundred times the affirmative strength to hang onto or attach itself to hemoglobin. That is the matter within the red blood cells and oxygen. So it hangs on for a very long time.

Q Well, Doctor --

A Now at .5 per cent hemoglobin saturation of carbon monoxide, merely means a very small amount of carbon monoxide that is in the red blood cells of the blood.

Q Now, Doctor, perhaps my question wasn't phrased quite properly when I say how. I will state it to you this way. Would you describe the physiological process that takes place whereby -- is carbon monoxide found naturally in the body?

A No, it is not.

Q It has to come into the body in order to get into the blood, is that correct, Doctor?

A Yes.

Q Will you describe to the jury this process, the process where carbon monoxide enters the body and ends up in the blood?

MR. GARDNER: If your Honor pleases, I object.

I don't think we have to belabor this jury with this testimony. It is not in issue.

Q I will put it this way: Do you have to breathe it in, Doctor?

A You certainly do.

Q Now would you explain to them how it's done, what happens to it?

A The material is breathed in as oxygen and as nitrogen into the lungs. It is then, by a process, absorbed by the hemoglobin of the red blood cells and carried about the blood.

Now in most instances this is the transport mechanism of oxygen to the various parts of your body.

Q Now, Doctor, one must be alive for that to take place; isn't that so?

MR. GARDNER: I will object. That is leading and suggestive. It is also conclusory.

THE COURT: It is the doctor's opinion.

A The carbon monoxide enters the blood when a person is alive, yes. person is

Q Doctor, I show you Plaintiff's Exhibit 11C in evidence. It is a photograph purporting to be the position of the decedant while he was at the scene behind a vehicle. Do you see the exhaust pipe from that vehicle, Doctor, see the

tailpipe there.

A Yes.

Q Could the exhaust from that tailpipe breathed in by George Haber while he was lying on the ground behind the vehicle account for the carbon monoxide that you found on the toxicology report?

MR. GARDNER: That is objected to. Counsel is testifying and a foundation has not been laid.

THE COURT: Waita minute. Without more, the objection is sustained. Disregard the question. Disregard the inference you may be thinking therefrom.

MR. WHITE: May I rephrase it, Judge, if that's a problem?

THE COURT: You have to do more than that to get a hypothetical in. You've got to get an opinion from this witness.

MR. WHITE: I don't want to waste time.

THE COURT: If I understand your witness' prior testimony, and it is the jury's recollection which will control, not mine, if I were walking around in an area in which there were a lot of cars, I could ingest amounts of carbon monoxide. Isn't that correct?

THE WITNESS: That is correct.

THE COURT: Until you negative that, you cannot

pose what you pose.

MR. WHITE: I understand.

Q Doctor, when you talk about in a parking lot, you're talking about being in close contact with fumes or are you just talking about general atmosphere, for example, if you were out in front of the courthouse, out in front of the building here where there are cars parked down the street, would that be just vehicles parked up and down the street and traffic on the roadway, would that be enough?

A Yes.

Q Or would it require more than that?

A Yes, and to further elucidate that point, drivers along the Los Angeles Freeway have been known -- have been found by testing to have as high as 12 per cent, not .5 but 12 per cent carbon monoxide.

Q You mean 12.0?

A 12.0 as opposed to .5 in this instance.

Q This is the hemoglobin saturation?

A Hemoglobin saturation.

Q Doctor, did you also test for alcohol?

A Yes.

Q Was that present?

A Absent from stomach, blood and brain.

Q No other poisons present other than the carbon monoxide according to the report?

A Poisonous gases, no poisonous gases. Volatile poisons, none.

Q Now, Doctor, did you find something called tetrahydrocannabinol present in the alcohol swabbings of the teeth and lips?

A Yes, that is tetrahydrocannabinol.

Q Is it sometimes called TDC?

A THC.

Q THC, I am sorry. Is that a chemical found in what we laymen call marijuana?

A Yes, it is.

Q Can you tell from these findings of the alcohol swabbings, how long before you took your swabbings that that was there?

A No. The exact time I can't tell you. I don't know. It had to be fairly recent. The exact time sequence I'm not sure of.

Q Doctor, when you say recent, what do you mean by that?

A In terms of a day or two.

Q Day or two; in other words, within --

A Within a day or two.

Q Two days or less, but you can't tell any more?

A I can't. Maybe someone else might be able to and

might be able to give you a better answer on that.

Q You have something on here called antithoteric?

A Yes.

Q Lysergic acid or LSD in parentheses?

A Yes.

Q What is that, Doctor?

A It is the hallucigen LSD, the material that has been talked about, has been written about and has been publicized.

Q You found this in the young man's blood, correct, sir?

A That is correct.

Q And in what quantity?

A The toxicologist found 200 nannograms, 200 liters of blood.

Q What is a nannogram?

A A nannogram is less than -- you are dealing in terms of less than one hundred -- certainly much, much less than milligrams and you are talking in terms of hundreds or thousands of milligrams.

Q Thousands of milligrams?

A And hundreds.

Q Hundreds or thousands? So it is thousands of milligrams?

A Right.

Q It is a minute quantity --

MR. GARDNER: That is objected to.

MR. WHITE: I will withdraw it.

Q A thousandth of a milligram, what is a milliliter?

A What is a milliliter?

Q What is a milliliter?

A It is 1/1000 of a liter. And a liter is approximately a little more than a quart.

Q Doctor, was any of this compound detected in his stomach, brain or --

A No, it was not.

Q Now, would you tell us if this anthoteric -- is that the proper term for it?

A Anthoteric.

Q When that is ingested, how does that travel through the system?

A Yes, it is usually ingested.

Q And how does it travel through the system?

A It is absorbed through the gastrointestinal tract and is transported --

Q Where?

A In the blood.

Q Where is it transported to?

A The target is the brain.

THE COURT: How does it get there? Through the blood system?

THE WITNESS: Through the blood.

Q Until it gets to the brain, does it produce any effects, Doctor?

A Well, it --

Q Until it gets to the brain, does it produce any effects, Doctor?

A No, it doesn't.

Q You had no evidence in your toxicology report that it had reached the brain; isn't that so?

MR. GARDNER: Objection.

Q Did you have any evidence in your toxicology report that it had reached the brain --

MR. GARDNER: What he said at the time of the autopsy, there was no findings of it within --

MR. WHITE: I am asking did he find any evidence --

MR. GARDNER: That's why I'm objecting to the question.

THE COURT: This doctor can handle it.

MR. WHITE: Can you answer that, Doctor?

THE COURT: Can you answer?

THE WITNESS: If I may, could I have the

question re-read to me, please?

(Whereupon, the Court Reporter read back the last question.)

THE COURT: Do you have any evidence, strike out in toxicology report. Did you have any evidence that it had reached the brain?

THE WITNESS: Yes, it had.

Q What do you base that conclusion on, Doctor?

A The blood -- the sample of blood that we took, it is a sample and that is circulating and therefore the brain has been bathed in this 200 nannograms per hundred millliliter of LSD.

Q Doctor, when you examined the brain, you found no evidence of the LSD in the brain, right, sir?

A In terms of the brain itself, no, I did not.

Q And did you examine the brain to determine whether the LSD had gotten to the brain, did you not, sir?

MR. GARDNER: That is objected to.

THE WITNESS: Not to --

MR. GARDNER: Counsel is making a distinction in his question relating back to a prior --

THE COURT: Between the blood vessels and the brain and the jury is sophisticated enough to know that the doctor said the brain was bathed in it.

Q Doctor, when you say the brain was bathed in it, there were a number of blood vessels that go through the brain itself?

A Many.

Q And material then goes from the blood vessels into the brain cells themselves, true?

A Yes.

Q So when you talk about this material reaching the brain, you are talking about its reaching the brain in the blood vessels as distinguished between reaching the brain cells, true?

A Not quite. The fact that it has reached the brain, the blood has reached the brain and has been in contact with the brain.

The amounts of LSD that has defused into the brain are of such quantities that we cannot detect it, yet it is there. It has produced its effect.

Q You are talking about nannograms?

A That and --

Q Or less?

A Less than nannagrams.

Q Less than nannagrams; now, Doctor, have you made any studies of LSD in the brain, have you done anything like that?

A In our efforts to locate the effects of LSD in the brain cells or to associate the amounts of LSD in the brain, we have never been able to come up with a positive figure.

Q Doctor, again, I don't think you understood my question; I want to know if you personally, in the course of your studies, have either by way of laboratory study or personal research --

THE COURT: In this case or in his experience?

MR. WHITE: In his experience. I want to know if the doctor knew anything along those lines from a personal study or otherwise about LSD and the effects on the brain. Do you understand my question?

THE WITNESS: In terms of our work in the Medical Examiner's Office, we have tried to detect the levels of LSD within the brain tissue and have not been successful.

Q I'm not making myself clear, obviously.

What I want to know, Doctor, is you never do any kind of study yourself other than -- I am not talking about the pathology aspect of this. I am talking about the effect on the body chemistry. What it does to the brain. How it functions in the brain. What it does to the physiology of a person that has taken it, if you were an expert in that area --

A No, I am not.

Q Thank you very much.

So, Doctor, you can tell us what your findings were and where you done that?

A That is correct.

Q Now, Doctor, in addition to those photographs, you had with you I think you said drawings, showing the entrance and exit of the bullet; is that correct, sir?

(Witness handing document)

And you have another copy of this at your place of business, sir?

A The original is there.

Q The original. So if I were to offer this in evidence, there would still be an official record if I took this away?

A Yes.

MR. WHITE: Your Honor, I offer the Doctor's autopsy report and the drawings in evidence.

It has been previously marked as Plaintiff's Exhibit 16 for identification.

THE CLERK: Plaintiff's Exhibit 16 received in evidence.

Q Now, Doctor, the photograph of this young man's face, that is Plaintiff's 19 in evidence, the face itself as distinguished from the head, does that show marks of injury

about his cheek, lips?

A No, it does not.

Q Could you tell us what is shown where I have my pen?

A These two are dried blood material from out of the nose and out of the mouth.

Q Of George Haber?

A Yes.

Q Do you know when the blood came out of his nose and mouth?

A I do not know. All I know is when the body arrived at the morgue those stains were there.

Q And could you tell us whether those stains came about from a blow delivered to the nose or not, can you, Doctor, do you know that?

A No.

Q And simply with the mouth, you would not know whether it came from the mouth or not?

A It did not come from a blow to the mouth.

Q Doctor, just one other thing: The gentleman seated at the table counsel is from your office?

MR. GARDNER: That is Sgt. Stillmeyer.

MR. WHITE: That is the defendant?

MR. GARDNER: Yes.

MR. WHITE: I don't have anything else.

THE COURT: Are you going to be some time?

MR. GARDNER: I figure fifteen minutes tops, Judge.

MR. WHITE: Judge, I just realized one other thing.

Q Did this gunshot, this bullet, was that the cause of death inthis case?

A I didn't hear you.

Q Is this gunshot wound, did this gunshot cause this man's death?

A Yes, it did.

MR. WHITE: I'm sorry, Judge.

THE COURT: Doctor, would you be agreeable to letting this jury go to lunch and start again at 2:15? When an attorney tells me it's going to take fifteen minutes, I double it. That is a normal routine. There's no way they ever finish.

MR. GARDNER: You can clock me. You can clock me. If I tell your Honor I'll take fifteen minutes--

THE COURT: I wouldn't want to shut you off. We'll take a luncheon recess, if that is all right with you, Doctor.

2:15. Please do not discuss the case.

You may step down, Doctor.

(Witness excused.)

(Jury excused.)

THE COURT: Have another matter at 2:00 o'clock. I will be kind of pressed. It is from two to two fifteen.

(Whereupon, the Court recessed for the luncheon recess.)

* * *

3 Aroki - cross

MR. GARDNER: Dr. Arokai, would you resume the stand.

(Witness resumes the stand.

CROSS-EXAMINATION

BY MR. GARDNER (Cont'd):

Q With the Court's permission, Dr. Aroki, you have been doing autopsies for how long?

A For the medical examiner's office, for a period of fifteen years.

Q You have seen people who expired as a result of a gunshot wound?

A Many.

Q Can you tell us what the extent of your experience was in seeing people who had expired?

THE COURT: Mr. Gardner, I asked Mr. Weitz to use the back lectern. I think it would be helpful.

MR. GARDNER: I will turn it this way.

THE COURT: It's helpful to the last juror.

Q How many people who had died as a result of gunshot wounds did you have occasion to do autopsies on or assist in autopsies?

A Oh, I would say several hundred, the exact number I really don't know. I haven't kept score, so to speak.

Q As far as those autopsies were concerned, those hundreds of autopsies, you have seen other examples of gunpowder marks or tattooing as a result of the gunpowder?

A Yes, I have.

Q Now, is there a relationship between the distance the muzzle of the gun would be from the person who had those powder burns?

A There are many variables; one is distance; number two is the weapon; number three is the charge of the cartridge, the amount of powder in the cartridge. Each individual weapon has its firing characteristics and in order to verify the exact range in the exact person you would have to testfire it.

Q Would you have an opinion, at least as far as Mr. Haber was concerned, as to how far the muzzle of the gun was from his left chest to give that 2-5/8 inch powder burn?

A It would be in the range of six inches or less.

Q Now, in addition to the powder burns that were on Mr. Haber's left chest, that 2-5/8-inch circle of powder burns which you indicated would show that the muzzle was approximately six inches or less away from

that chest; you also found powder burns on the left forearm; is that correct?

A Yes.

Q Would that be indicative of the fact that in some manner his left forearm was in close proximity to that gun, that weapon that was discharged?

A Yes, it was.

Q Give us approximately the distance for the powder burns that you found on Mr. Haber's left forearm; how far away from the muzzle of the gun, that left forearm would have to be?

A Approximately up to six inches away.

Q And, of course, now the powder burns were found on Mr. Haber's forearm between his wrist and his elbow; right?

A Not all of that. The impression that I was trying to put forth --

MR. WEITZ: I'll object to impressions.

THE COURT: It is the opinion that he was trying to put forth; isn't that right? I'll it as qualified.

A The impression that I was trying to convey is that it was in the forearm which by definition is from the wrist to the elbow; it was not from the wrist to the

elbow, but it was in that area.

Q Between the wrist and the elbow?

A Right.

Q I must ask you, did you happen to measure how long his left hand was, from the wrist to the fingers?

A I did not.

Q And all that powder burn on his left forearm was between the wrist and elbow; did you indicate anywher e how far away from the left wrist the powder burns started?

A No, I did not. However, it was close to the wrist, in the distal one-third or middle one-third of the forearm.

Q Now, the angle that the bullet transversed or went through Mr. Haber's body, you indicated that it was a left to right angle; is that right?

A Left to right; yes.

Q It entered from the left side not going straight back but on an angle towards the right?

A The mor eproper terminology is obliquely through the body.

Q I'm trying to get the ISA -- to be helpful I would like it take it down to easier terms. When you say obliquely, this bullet shot,at least the path the bullet took, it wasn't front to back directly?

A No, it wasn't.

Q It was on an angle, going from left to right?

A Yes, it was.

Q And that was approximately a 60-degree angle, you told us?

A Yes, it was.

Q And also it was not an angle that went from the top down; correct?

A That's correct.

Q It was an angle going from the bottom of the left nipple upwards?

A Yes, it was.

Q The way the bullet entered Mr. Haber, however it was discharged, would be below his left nipple going up to the rear at a 10-degree angle and going from left to right at a 60-degree angle?

A Yes.

Q It didn't go off from top to bottom. It didn't enter from top to bottom, did it?

A No.

Q It entered underneath the nipple going up 10 degrees and 60 degrees left to right?

A That is correct.

Q Now, in all your experience, doctor, taking

into account the factor of the powder burns, 2-5/8 inches, which would indicate the muzzle was six inches from the chest, the powder burns on the wrist --

MR. WEITZ: Objection.

Q The powder burns between the wrist and the elbow on the forearm, and taking into account the direction of the bullet, namely, ten degrees at an angle going from the bottom upwards and 60 degrees going from left to right, in your opinion, with a reasonable degree of medical certainty, is that compatible with a weapon discharging in a struggle, making that kind of a path?

MR. WEITZ: Objection to "struggle."

THE COURT: I will allow it.

A Yes, it is. It is compatible with a discharge during a struggle between two persons.

Q Discharge at close range?

A At close range.

Q Now, doctor, I would like to spend some time in language that I understand concerning the LSD and concerning the marijuana.

Now, LSD, that's a short term for a particular kind of hallucinagenic drug?

A Yes.

Q Tell us in language, layman's language, when

you say hallucinagenic drug, what is the effect of LSD in terms of being a hallucinagenic drug?

A Hallucinagenic drug simply means that variety of drug that tends to make you go into a dream world or -- dream and phantasize.

Q It would make someone under the effects of the drug act differently than he would act without the drug?

A It may; yes.

Q It would make a person who was under the influence of that drug do things that he might not normally do if he was not under the effects of the drug?

A That would be correct, yes.

Q Now, when the toxicology examination was done, some blood I take it was drawn to do some studies for Mr. Haber; right?

A Yes.

Q I take it a small sample of blood was taken, namely, a millileter, and it was measured to see how much of the drug was measured in that one small sample; isn't that correct?

A Yes.

Q Of course that would then -- would you as a doctor be able to determine how much total LSD was in the entire bloodstream since the one milliliterthat was taken was

a sample of all of the blood in his body?

A Yes.

Q So Mr. Weitz is talking about two hundred milliliters and you were talking about two hundred milliliters only within --

THE COURT: He is talking about two hundred mannograms.

MR. GARDNER: I withdraw the question. I thank your Honor.

MR. WEITZ: I read it from a report. I read it in his report.

THE COURT: Don't interrupt on something like that.

MR. WEITZ: I object to the form of the question.

THE COURT: The question is only as to milliliters instead of nanograms.

Q Doctor, when you were examined by Mr. Weitz, your discussion was in reference to 200 nanograms; that was 200 nanograms per one milliliter?

A A hundred milliliters.

Q Can you tell us how much there was -- approximately how much of this LSD was within Mr. Haber's body, at least at the time the toxicology examination was done some time after his death?

A Well, that depends upon his blood volume at the time of his death and, of course it varies, butin a man of five feet nine inches, and I don't recall his exact weight at this point --

Q I believe you told us it was 158 pounds.

A T he blood volume is probably around three to three and a half liters which is 30 to 35 times the amount that we are discussing, the 200 nanograms.

Q So within his whole body there would be approximately 35 times 200 nanograms?

A Yes; that is correct.

Q How much is that in terms of whether that's a slight amount, little amount, tiny amount, great amount?

A It was in the order of a larger amount for this particular drug.

Q And is this drug, the LSD, is that a toxic drug, does a small amount really pack a tremendous wallop?

MR. WEITZ: The witness said he didn't know about this on direct examination.

THE COURT: I'll allow it. He is a doctor.

A The amount that he would have had to take to reach this level would be considered a large amount in terms of what is normally used by the drug culture on the outside.

Q And does that small amount substantially

less than what was in Mr. Haber -- what would be the normal amount, normal in the sense of what the drug culture would use as a normal dose?

MR. WEITZ: Judge, I'll object to that.

MR. GARDNER: Withdrawn. Describe what you mean.

MR. WEITZ: I'll withdraw the objection. But let's hear what the doctor has to say about that.

THE COURT: I think it's pretty vague myself. I don't know much about LSD. Doesn't it come in little sugar cubes?

THE WITNESS: The LSD Is soaked into the sugar cubes by eyedropper. They do it in terms of drops on the sugar cube. It depends on the concentration of the material you are dealing with.

THE COURT: In the eyedropper?

THE WITNESS: Yes.

THE COURT: If you had 100 per cent pure LSD and one drop in a sugar cube, that would be a healthy dose?

THE WITNESS: It's a healthy dose; yes, sir.

THE COURT: Is that what you mean by a normal dose taken by the drug culture?

THE WITNESS: Yes.

THE COURT: So this is more than that?

THE WITNESS: Yes, it was. From what we have seen in the past.

MR. WEITZ: May we know what the doctor means when he says "what we have seen in the past"?

Q Tell us what you mean by "what we have seen in the past"?

A In terms of other drug cases that our jurisdiction has run into.

Q Now, there was marijuana of the chemical -- that's a derivative of marijuana found on Mr. Haber's teeth; is that correct?

A Yes, it was.

Q Do you know, doctor, whether or not the use of marijuana in conjunction with the use of LSD at the same time, what effect that has on the LSD, whether it potentiates it or not?

A I really don't know.

Q As far as Mr. Haber was concerned, at least at the time that the toxicology report was done, he did have that amount of LSD in him and he had the marijuana, that was discernible as far as his lips and teeth were concerned; is that correct?

A Yes, sir.

THE COURT: Does that mean, doctor, for my own edification, does that mean that he was necessarily smoking marijuana or otherwise ingesting it?

THE WITNESS: Smoking marijuana, most probably.

THE COURT: I take it you can ingest this in liquid as well as smoke form?

THE WITNESS: I really don't know. I've never seen it or heard of it being done that way.

THE COURT: Take his word for it not mine.

MR. GARDNER: I have no further questions.

REDIRECT EXAMINATION

BY MR. WEITZ:

Q Doctor, before coming to court today did you discuss your testimony with anybody from Mr. Gardner's office?

A No, I did not.

Q When you went out to lunch and before resuming the stand, did you discuss your testimony with Mr. Gardner or anyone from his office?

A In brief, I did speak to Mr. Gardner.

Q Now, when you spoke to Mr. Gardner at that time, did you discuss with him the multiplication of the nanograms by milliliters; just yes or no?

A Yes, I did.

15 Aroki - redirect

Q And when you discussed this subject of LSD and the drug culture on the stand, you had previously discussed that with Mr. Gardner, too?

A No.

Q Doctor, when you said other drug cases that you had been involved in, have you gone to court on behalf of the County of Nassau and testified as to the effects of LSD on a person who ingests it?

A No, I have not.

Q Have you ever gone to court and testified on behalf of the Police Department on the effects of marijuana on someone who uses it?

A No, I have not.

Q Your work relates to people who are already dead; isn't that so, sir?

A Yes, it is.

Q Doctor, I don't mean this facetiously, your knowledge of the drug culture, that's not by your living in the drug culture?

A I hope not.

Q So that what you were telling us before, how LSD was taken, is that a subject that you discussed with Mr. Gardner before you got on the stand?

A No, I did not.

Q Doctor, did you ever go out and interview people as to what is a normal use of LSD?

A No, I did not.

Q Did you ever go out and speak to anybody and say, "Well, you're a user of this product, how much is a big dose and how much is a little dose and what is a regular dose"? Have you ever done that, doctor?

A No.

Q Have you told us before lunch and before you spoke to Mr. Gardner, as far as the subject of LSD is concerned, you were not an expert in that field; did you tell us that?

A Yes, sir.

Q Now, doctor, did you also discuss with Mr. Gardner before you resumed the stand this afternoon where the powder burns on the flexor surface of the left forearm were?

A I believe the only discussion we had was in reference to the amounts of LSD that would be found in the body as a whole. He asked a question, I answered it.

Q Doctor, is your present recollection as you sit on the stand now, that you did not discuss with Mr. Gardner the location of the powder burns on this lad's forearm?

A Yes, I did. Yes, I did not discuss that with him.

Q When you testified this morning as to the location of the powder burns as to this man's forearm, you were telling this [illegible] something that you saw when you conducted an examination; true?

A Yes.

Q Now, when you came back after lunch and Mr. Gardner asked you these questions, you told us that you were now giving us your opinion about the powder burns; true, didn't you use these words, it was your opinion where it was?

THE COURT: You objected to the word "impression."

Q You used that word?

A It seems that I did.

THE COURT: I used the word, he didn't.

Q And before lunch, before you went out when I asked you this morning as to where those powder burns were, didn't you tell us it was about midway up on the forearm?

A Midway to the wrist.

Q Did you say midway up to the forearm?

A Yes, sir, and no higher.

Q Are you saying to this jury now that you used the phrase and it was no higher, is that your testimony now,

that you used that phrase this morning?

A I think in my testimony this morning.

Q Doctor, could you -- can I have an answer to my question. I withdraw the question and reframe it.

The photographs that were taken of this body, you did this examination -- were photographs taken of the flexor surface of this young lad's forearm?

A I don't recall the pictures now. There were many many taken, and at this particular point I really don't know which pictures were taken.

MR. GARDNER: The entire file was produced.

MR. WEITZ: Object to the word "entire."

I'm going to hand this witness the photographic file here.

BY MR. WEITZ:

Q Will you tell us and tell this jury -- hold them to yourself so we don't have a problem about anything being disclosed that's not in evidence. Just look at them and tell us in all of those pictures whether you have a photograph of the flexor surface of this young lad's left arm? Did you come across such a photograph, doctor?

A No, I did not.

Q How many autopsies have you done since 1972, doctor?

A 1972?

Q Since September 29, 1972, how many have you done, doctor-- September 30, 1972?

A Close to a thousand.

Q And, doctor, your report as to where this burn was, that is now in evidence, doctor, so I'll read it to you: Your report says:

"The upper extremities show powder burns on the flexor surface of the forearm."

T hat is all your report says, doctor.

MR. GARDNER: I'll object to that.

A Yes.

Q But, doctor, your present recollection after having lunch and after having a conversation with Mr. Gardner which did not relate to this subject --

MR. GARDNER: I'll object to the form of the question as to "Mr. Gardner."

Q Your present recollection now after lunch is that you now remember that on this individual the powder burns went down to the wrist; is that what you are saying?

THE COURT: That's not what he's sayi ng.

MR. GARDNER: That's not what he is saying.

THE COURT: That's not what I recall. Don't put words in his mouth. You called him.

MR. WEITZ: I thought that's what he said. If that's not what he said --

THE COURT: That's not my understanding; it's the jury's recollection that will control.

MR. WEITZ: If that's not what he said --

THE COURT: Ask him.

MR. WEITZ: I remember what he said this morning. I'll stand on what he said this morning and I have no other questions of him.

THE COURT: I have a question.

Where were the powder burns on the left forearm as you best recollect now?

THE WITNESS: Best recollection as I tried to convey this morning, the powder burns were no higher than the lower two-thirds of the wrist.

THE COURT: Of the bottom part of the hand?

THE WITNESS: This is where the powder burns were (indicating). And I was trying to convey that to you this morning; and I was trying to convey that to you this afternoon.

BY MR. WEITZ:

Q Doctor, did you say this morning that the powder burns were in the middle of the flexor surface?

A Mid one-third to the distal one-third.

MR. WEITZ: I have nothing else.

RECROSS-EXAMINATION

BY MR. GARDNER:

Q Doctor, describe to the jury and hold up your left forearm what the mid one-third of the distal is.

A This is the elbow crease; this is the wrist crease.

Q Put your hand on it so the jury can see it.

THE COURT: Indicating about midway between the elbow and the wrist.

Q Now, doctor, would you be kind enough to tell us where you gained this knowledge that you had about the drug culture even though you do autopsies -- though you do autopsies, doctor, I take it you have read medical literature?

A Yes.

Q You keep abreast of medicine even outside of your field of doing autopsies?

A And particularly where it might affect my work in the long run.

Q Tell us where you got this knowledge about which you testified before concerning the drug culture and what a usual amount it was?

A That again is from reading and from conversation with others in our field and from experiences.

Q And, doctor, so I can put an end to at least one aspect of this: doctor, did you and I have lunch together?

A No.

Q You went out and had lunch and I went out and had lunch?

A I don't know where you were.

Q You had lunch?

A Downstairs, the concession, coffee.

Q And the question that I asked you about before you took the stand, was it not, doctor, limited to that question, if he had 200 nanograms in 100 milliliters?

A That was your question.

MR. GARDNER: No further questions.

RE-REDIRECT EXAMINATION

BY MR. WEITZ:

Q Doctor, give me the name of one book that you read on the use of LSD?

A At this point I don't remember any of the literature, names at this time; also, authors at this point.

Q Doctor, give me the name of one book that you read on the effects of LSD in the human body?

A No.

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Q Can you give me the name of any article that you read concerning the effects of LSD in the human body?

A No, I cannot.

Q Can you give me the name of anybody that you recognize as an authority who has written anything that you read concerning the effects of LSD in the human body?

A At this point I cannot.

MR. WEITZ: I don't have anything else, Judge.

THE COURT: All right, doctor, you may step down.

(Witness excused.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

GEORGE HABER,

Plaintiff,

-against-

NASSAU COUNTY,

Defendants.

73 C 1408

----------x

United States Courthouse
Brooklyn, New York

April 29, 1976
9:30 O'clock A.M.

B e f o r e :

HON. THOMAS C. PLATT, U.S.D.J.

Steven a Tessler

STEVEN TESSLER
Acting Official Court Reporter

BEST COPY AVAILABLE

APPEARANCES:

HARVEY WEITZ, ESQ.,
Attorney for Plaintiff

JOHN GARDNER, ESQ.,
Attorney for Defendant

F R A N K F E H N , called as a witness, having been duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEITZ:

Q Do you have among those documents a Form 350?

MR. GARDNER: If your Honor please, I am going to object to this question. This officer was brought here pursuant to a subpoena. I think I'm entitled to know what the subpoena is that was served upon him and what that subpoena was, what that requested him to bring.

I must say, if your Honor please, there was much to do this morning about Officer Fehn not being here and I think the procedure should be a reason for the time he wasn't here when Mr. Weitz say he should be here.

THE COURT: Bring in the jury.

MR. WEITZ: Can I have the documents which I served a subpoena on?

THE COURT: You didn't serve this witness.

MR. WEITZ: Can I have the documents

that are in the Court --

THE COURT: I have no way of knowing whether these documents are covered by that subpoena. I am not going to introduce documents. Bring in the jury.

MR. WEITZ: Are you going to allow me to try the case, Judge; won't you let me see the records?

THE COURT: You're going to try it your way, do it your way.

BY MR. WEITZ:

Q Were you the detective assigned to investigate this case?

A Yes, sir.

Q You work for the County of Nassau?

A Yes, sir.

Q Are you with the Police Department of Nassau County?

A Yes, sir.

Q That batch of papers you're holding in front of you, are those part of the papers concerned with your investigation?

A I have to look at them.

MR. GARDNER: I would like the record

to reflect where the batch of records came from.

THE COURT: The court file. We were noticed by Nassau County that some documents were delivered to us this Sunday, unknown to me. My law clerk discovered it this morning.

Would you do me a favor, Mr. Weitz, and use the podium in back of the jury box so that the last juror doesn't look at your back.

MR. WEITZ: Sorry.

BY MR. WEITZ:

Q Before September 29th, 1972, were you assigned to the Homicide Bureau?

A Homicide Squad, Police Department, County of Nassau. Yes, sir.

Q Was there a custom procedure followed by the Homicide Squad in investigating the killing of human beings?

MR. GARDNER: Objection to the form of the question.

THE COURT: Sustained.

Q What is a homicide, Officer?

MR. GARDNER: That is not an issue in

this case, I object.

THE COURT: Sustained.

Q Was there a custom and practice followed by the Homicide Squad in the investigation of the death of individuals taking place within the County of Nassau?

A There is not a custom, sir, there is a procedure.

Q Were you familiar with that procedure?

A Yes, sir.

Q Is that procedure something that is reduced to a written protocol?

A Written report, yes, sir.

Q Procedure, it's the method of proceeding -- is that a written method or a customary method?

A They're not written, sir.

Q Would you tell us what the procedure consisted of in September of 1972?

MR. GARDNER: I'll object, your Honor. How the procedure was, how the investigation was conducted in general has no relevancy to the issue of this lawsuit. There is no claim that the procedures usually followed weren't followed.

MR. WEITZ: I'm trying to find out if

we have all the records, Judge, and I will note when he tells me what the answer is.

THE COURT: I'll sustain the objection.

Q Officer, as part of your investigation where a gun is involved, is a search made for the fingerprints?

A Yes, sir.

Q Is there a form in which such a search is reported?

A Yes, sir.

Q Is that known as a Form 350?

A It may be, sir.

Q Was such a search made in this case?

A I don't remember, sir.

Q Would you look at the records and see if they refresh your recollection?

MR. GARDNER: If your Honor please, I will have to object to that.

THE COURT: Is there a Form 350 or fingerprint report in the file you have in front of you?

MR. WEITZ: The implication that is being appropriately drawn, your Honor, those records are records that were delivered six months ago.

THE COURT: I understand that, the jury knows that.

MR. WEITZ: That is exactly what I was getting at, Judge.

THE COURT: There is no record that six months ago you asked for any such records.

MR. WEITZ: I subpoenaed records for today.

THE COURT: There has been no appearance today by --

MR. WEITZ: By any record from Nassau --

THE COURT: The County is under instruction to bring in the records. You may proceed with the questioning of this man.

MR. GARDNER: If your Honor please, I have to object to the form of the purported request.

THE COURT: I will tell the jury this much, this work should have been done a year and a half ago by the plaintiff. He hasn't prepared his case and that is the reason we are going through this part of the case today. Now, go ahead.

MR. WEITZ: If your Honor, please, in light of what you your Honor has just said, I want to show the Court Plaintiff's Exhibit 12 for examination which was used at the pretrial conference, which specifically refers to such a form being attached and it's not. When I tell the Court there is records asked for that were not furnished to me, that is the reason. I hand it up to your Honor, there is records in that exhibit that were to be attached, which weren't attached.

THE COURT: You didn't do your home-work.

MR. WEITZ: Are we playing a game?

THE COURT: You have nobody but your-self to blame. Do not attempt to put the blame on this Court or anybody else.

Proceed, you want me to take appropriate action with respect to you?

MR. WEITZ: I am waiting to see if Form 350 is in those papers.

THE COURT: It is nobody's obligation on any part to show you the case. You mark

anything you want as an exhibit in the form of I.D.

THE CLERK: Two-page document marked for identification, Plaintiff's Exhibit 14.

(So marked.)

THE WITNESS: I do not see a Form 350, I see a notation in my form 262 which is a supplemental report which I make out, that indicates there should be a P.E.D. on Form 350.

BY MR. WEITZ:

Q Would you tell the jury what P.D.E. and Form 350 is?

A It's a latent fingerprint report compiled by a scientific bureau with latent fingerprints.

Q What are --

A From the scene, from the deceased for comparison.

Q How about the weapon itself?

A Or from a weapon, regardless where, automobile, weapon, anywhere it might have been.

Q Is that fingerprint form anywhere in this courthouse to your knowledge?

A I have no idea.

MR. GARDNER: I'll object.

THE COURT: He says he has no idea, I'll allow it.

Q But it was done according to your record, the latent fingerprint report?

A And Form 350 was compiled.

Q And it was attached and made a copy -- and made a part of your report, wasn't it, sir?

A Yes.

Q Could you account for its absence?

MR. GARDNER: Objection to the form of the question, absent, where?

THE COURT: Sustained.

Q Could you account why it's not with your report you have on the stand here today?

MR. GARDNER: He mentioned your reports you have on the stand today, it's not what those documents are.

THE COURT: This witness can so state.

THE WITNESS: Form 350 is not here, sir, I don't know why.

Q Investigating a homicide, sir, is there some method of determining whether the persons hands were on a weapon when it was fired?

MR. GARDNER: Objection to the form of

the question.

THE COURT: Sustained.

Q Based on your experience, sir, in a Homicide Squad, is there a test known to police officers to determine whether a part of a human being was in contact with a weapon when it was fired?

MR. GARDNER: That's objected to, if your Honor please, that question is conclusory, it depends on a lot of variables.

THE COURT: I'll allow it. Bear in mind, this is a attempt to elicit an opinion from this witness, which may or may not have some bearing on this case.

THE WITNESS: Neutron Activation and a Paraffin Test, sir, either one.

BY MR. WEITZ:

Q What is a Neutron Activation Test, Officer?

A It's a swab taken off the hands of a person that may have discharged a firearm and the swab of those are sent either to the Federal Government Alcohol, Tobacco, or FBI for analysis.

Q And what will they show when they're positive, Officer?

A They'll show whether the person discharged a

firearm.

Q Is a Neutron Activation Test done in this case, Officer?

A I don't know; that would be done by our Scientific Investigation Bureau.

Q Officer, I am going to show you Plaintiff's Exhibit 12 in evidence and ask you to look at it and tell us whether it refreshes your recollection whether such a test was performed in this case, on the hands of this decedent?

A It does not, sir.

Q Officer, was a Paraffin Test performed on the hands of this decedent?

A I do not know, sir.

Q Officer, did a detective Ginarie go to the Meadowbrook Mall and take fingernail scrapings from the hands of the deceased?

A No, sir. I believe he went to the Nassau County Examiners Morgue.

Q Officer, would you read that out loud to us?

A Right to take fingernail scrapings from hands of the decedent.

Q I will ask you again, Officer, did Detective Ginarie go and take fingernail scrapings from the hands of

the deceased?

A Did a detective?

Q How many times have you testified in Court, Officer?

A Many times.

Q Can you answer that with a yes or no; did a detective go to the Meadowbrook Mall and take fingernail scrapings from the hands of the deceased?

A I don't know.

Q Officer, do you recognize this form?

A Yes, sir.

Q Is it a Nassau County Police Department form?

A Yes, sir.

Q You investigated this case, didn't you, sir?

A One of many, sir.

Q One of many cop shootings?

MR. GARDNER: Objection.

THE COURT: Sustained.

Q One of many shootings by a police officer?

A No sir, one of many investigators on this case. We are not talking about the number of cases I investigate.

Q Are you in charge of this case?

A There is a supervisor in charge.

Q Were you the one that conducted the investigation and wrote the report in this case?

A Yes, sir.

Q And when you conducted your investigation and wrote your report, didn't you familiarize yourself with the contents of the Investigation Bureau?

A Yes, sir.

Q Weren't you interested knowing when you made out your report, whether or not there was any evidence that George Haber fired the gun which caused his death; weren't you interested in knowing that, Officer?

MR. GARDNER: Objection to form.

THE COURT: I'll allow it.

THE WITNESS: I don't believe it ever came up that George Haber fired that gun, sir.

Q And you're familiar with that gun, aren't you sir?

A No, sir. I am familiar with a similar gun, but not that particular gun.

Q Didn't you examine that gun?

A No, sir.

Q Did anybody examine that gun?

A Yes, sir. Detective Ginarie from the Scientific Investigation Bureau.

Q Did he examine it to examine what kind of pull was used to fire it?

A Yes, sir.

Q Do you have a record of that examination?

A I believe you have a copy there, and I have a copy here.

Q Rather than guess what I have, will you show me what you have there?

A There are ten pages of Detective Ginarie's report here, sir.

Q Would you show me the one with specific reference whether he tested the gun for the pull required to fire it?

MR. GARDNER: Object to it, your Honor, that wasn't the prior testimony, or was that the testimony. The question was whether or not the gun was tested.

THE COURT: He's asking if there is a record here which pertains to the pull required to fire it. If there is one, he will show it to him.

THE WITNESS: There is no mention to pull.

Q You're looking at a report of a test that

was performed on this weapon?

A Yes, sir, among other things.

(Continued on next page.)

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Q Point out to me which report that is.

A PIC and form 350, regarding weapons.

Q That page doesn't record any tests it merely describes the weapon, isn't that so, sir?

A That is correct, sir.

Q Officer, did you misunderstand my question?

A No, sir.

Q You were the police officer in charge of this investigation subsequent to one superior, right, sir?

A Charge is the wrong word, sir.

Q Officer, did you perform a parafin test on either George Haber of Police Office Salmier?

A I did not, no, sir.

Q Was it done?

A Not to my knowledge.

MR. WEITZ: May I have a moment, Judge?

I have a file with some notes.

Q Officer, somebody is involved in a event which causes death of a person; you conduct an investigation, you endeavor to obtain written statements from those people?

A Yes, sir.

Q And there would be no exception to that; would there, sir?

A I don't believe so. No, sir.

Q Did you obtain a written statement from Mr. Salmier, the then Police Sergeant?

A Sergeant Salmier is a sergeant, I am a police officer. Anybody above the rank of police officer is investigated by a higher rank.

Q Was he investigated?

A I believe so, yes.

Q Is that investigation there?

A I don't have it.

MR. WEITZ: I respectfully call your attention to my subpoena which has been previously marked.

THE COURT: We are doing what we can for you, I understand you served the subpoena yesterday. When was it served?

MR. WEITZ: The day before yesterday, that is the reason for my anger.

THE COURT: Be that as it may, they're apparently looking for the records that you requested that are not here.

MR. WEITZ: The truth of that remains to be seen, doesn't it, Judge?

THE COURT: Preparation is a key to any trial of the case.

MR. WEITZ: I thought truth was, Judge.

THE COURT: Preparation on your part is necessary. You cannot saddle the court with your

work.

MR. WEITZ: I merely asked --

THE COURT: You cannot saddle the court with your work. I am not a partisan in this case. I am not permitted to do your work for you.

MR. WEITZ: Can I look at the investigation-- look at those records?

THE COURT: You may look at it.

Q You say "portion" what is missing?

A Photographs, a number of photographs.

Q How many were taken?

A Approximately 40, maybe 60. I don't remember in numbers.

Q Officer, other than photographs what else is missing?

A Police copy of the medical examiner's autopsy.

Q What else is missing?

A That is it as far as the homicide investigation is concerned.

Q Did you participate in any other investigation; did you?

A No sir.

Q Are these some of the photographs that were taken, Exhibits 11, A, B, C, D, E and F?

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MR. KLEIN: While you look at that, can I look at this your Honor?

THE COURT: You certainly may.

Police copy of the medical examiner's report, the photos and what else is missing?

THE WITNESS: Form 350.

Q Officer, in addition to what you have already told us, the photographs and the MES report, is there anything else missing from these papers with respect to the investigation that you conducted?

MR. GARDNER: If your Honor please, before we go any further may we at least have -- I respectfully ask this Court to mark that group of papers with an IO number so sometime in the future we can identify where that is, where it came from.

THE COURT: Exhibit 15, came from this court's file. I don't know, I never saw them before today; they were delivered to the court last summer sometime, I don't even know by whom although Nassau County claims to have delivered them.

THE CLERK: Bunch of documents marked for identification, Exhibit 15.

THE COURT: You testified as to why this batch is missing the police copy of the medical examiner's

report, the photos and the Form 35's.

Ask a new question.

Q In addition to taking statements written out by policemen, signed by the person from whom the statement was taken, statements were taken in a question and answer from from some witnesses, true?

A Yes sir.

Q That was Mackawein, Frank Fehn, Vanilla, and Laura Gaspar, true?

A Yes, sir.

MR. GARDNER: I object to the question. I don't know what the question is.

THE COURT: The question was were Q and A statements taken from those individuals and he said yes.

Q Were those papers in this document; those statements from those three witnesses in that document?

MR. GARDNER: May I please, when you say this document you mean document 15?

MR. WEITZ: The one that the Court says was sent in by the Police Department.

MR. GARDNER: Six months ago by Nassau County?

MR. WEITZ: I'll tell you those are papers that Mr. Gardner sent to the court, Judge, those are

not papers from the Nassau County Police Department.

I offer the document in evidence including the back page thereof.

MR. GARDNER: I object to it, your Honor, because they do not purport to be --

MR. WEITZ: The Judge was under the impression that is what it was.

MR. GARDNER: If your Honor please, I don't want to get into a debate to try and curry favor or impress the jury. I would like to put my remarks to the Judge and get a ruling.

THE COURT: Your objection to the Exhibit 15 is sustained.

THE WITNESS: May I answer your last question?

Q Officer, does this document contain the Q and A statements of the three witnesses; just yes or no?

MR. CARDNER: If your Honor please --

THE COURT: Sustained. He answered yes.

MR. GARDNER: That is not what he said.

THE COURT: He said there were three Q and A statements taken of those three witnesses, are they there?

THE WITNESS: No, sir.

Q Now, does that refresh your recollection

officer? Would you reflect, is there anything else that is missing from those documents with respect to the investigation that you conducted in this case, besides the Q and A statements of three witnesses, the 350 Form as to the latent fingerprints, the 40 to 60 photographs that were taken and the ME's report. Is there anything else you might now remember Officer?

A In answer to one portion of this question, Q and As are not taken, or part of the investigation. They are taken by the District Attorney's Office for their investigation.

Q Let me read --

MR. GARDNER: Mr. Weitz is now attempting to read into evidence a document that was not in evidence.

MR. WEITZ: I want to impeach this witness with his own words.

THE COURT: It's your witness you're impeaching, he's your witness. You put him on the witness stand. Is that what you are intending to do?

MR. WEITZ: I am going to ask him if it refreshes his recollection, Judge.

THE COURT: Hand it to him and ask him if it refreshes his recollection.

MR. WEITZ: Do I have permission to impeach

him, Judge?

THE COURT: Under the new Rules you can impeach your own witness.

MR. WEITZ: I'll attempt to impeach him.

Q Officer, did you ever say the following persons were interviewed and questions and answers, statements were taken by ADA Dillon?

MR. GARDNER: I'll object to him reading it.

THE COURT: Don't read, show it to him.

Q Did you ever report to anybody that copies of the question and answer statement taken by Assistant District Attorney Dillon taken were made a part of your report sir, did you ever do that?

A Yes, sir.

Q Are those questions and answers taken in those papers?

MR. GARDNER: Objection to the form of the question, unless he wants to say Exhibit 15 marked for evidence.

Q Are they there?

A No sir.

Q In addition to the question and answer statements from the three witnesses and Form 350 latent fingerprints missing, 40 to 60 photographs missing and the ME's

report. Is there anything else that is missing from those papers?

A It's possible, sir.

MR. GARDNER: We would like the question being asked here -- some documents marked in composite 15 for identification.

THE COURT: The record is perfectly clear on that and he says it's possible.

MR. WEITZ: Now if your Honor please, I have served a subpoena for records and they are not here. Can we adjourn to the next day of our case?

THE COURT: You have no other questions of this witness?

Q Did you ever see a written statement taken of Sergeant Salmier by any of his superiors?

A I did not. No, sir.

Q I think you told us that you never took any such statement, did you, sir?

A From Sergeant Salmier; no sir.

Q Of course you spoke to Sergeant Salmier?

A Yes, sir.

Q Do you have any notes of your conversation and written notes taken simultaneously with your conversation with Sergeant Salmier?

A No.

Q Are any such notes in existence anywhere?

A Not that I know of, no sir.

Q Did you take notes when you spoke to Sergeant Salmier?

A No sir.

Q You didn't undertake this investigation for the sole purpose of exonerating Sergeant Salmier, did you?

MR. GARDNER: Prejudicial and should be stricken and the jury should be instructed to disregard.

THE COURT: The jury will disregard it.

Q What was the purpose of your investigation?

A The cause of death, reason of death and present it to the Grand Jury for their determination.

Q Was there any reason for you to rely on your memory as to what Sergeant Salmier said rather than take notes when you spoke to him?

A I spoke to him regarding his health when I saw him in the hospital. That is the only interview I took of Sergeant Salmier.

Q You didn't ask him what happened?

A No sir.

Q How many years were you investigating homicides

as of November 29, 1972?

MR. GARDNER: Objection.

THE COURT: I'll allow it.

THE WITNESS: Two years, nine months, 29 days.

Q Are you still doing that work?

A Yes, sir.

Q Well, officer, whether you spoke to Sergeant Salmier about this case or not, did you ever go to the scene of the shooting?

A Yes, sir.

Q Would you like the photographs that we do have as an assistance to your recollection?

MR. GARDNER: Are you going to put the questions whether he needs his recollection refreshed or not?

MR. WEITZ: Certainly.

Q Do you have an intimate recollection what you found when you got to the scene?

A Yes, sir.

Q You do?

A Yes, sir.

Q Tell, sir, where was -- did you see the police vehicle when you came to the scene?

A When I arrived at the scene; yes sir.

Q I thought earlier before you had many many investigations and it is hard for you to remember?

A I didn't say it's hard for me to remember.

Q You have no trouble remembering this one, sir?

A I either do or do not remember.

Q Tell me when you first received a communication concerning -- not what you were told -- when you first received a communication concerning this shooting at the Nassau Colliseum?

A It was sometime after midnight on the 30th of September.

Q Approximately what hour?

A Between 12:00 and 1:00 a.m.

Q What time did you go on duty?

A On duty at 4:00 in the afternoon on the 29th of September.

Q What time did you go off duty?

A 8:00 in the morning 30th of September, sir.

Q As a result of that communication you received where did you go?

A Nassau Community College.

Q Concerned Turmoil in Uniondale?

A Yes, sir.

Q Is it true that is at the south end of the

Nassau Collisuem?

A That is correct.

Q And on the north side of the Collisuem is there a name for that roadway that comes into the parking lot?

A There maybe, sir. I am not sure.

Q There is a roadway which comes into the parking lot at the north end, true?

A Yes, sir.

(Cont'd on next page.)

30 Fehn-direct

Q And the colliseum is on a parking lot surrounded by north, east, south and west by parking lots, is that true?

A Yes.

Q Officer, which way did you come to the scene; by that I mean via the Hempstead Turnpike or the north entrance or some other entrance?

A Hempstead Turnpike.

Q From the east or west, Officer?

A From the east.

Q So that you made a right turn to enter the coliseum parking lot?

A Yes, sir.

Q Had you already been informed that -- as to precisely where within the parking lot area you were to go?

A To the east parking field.

Q Would you tell us and tell the jury what you call the east parking field?

A The coliseum is a circular building that has concrete and floral designs which form a square, or a rectangle around the building.

So, anything from the south-east to the north-east corner of that square or rectangular side parking area would be the east parking fence.

Q Is there a distinction between the east and

south-east or the entire east on the east side, the east parking?

A The entire part on the east.

Q There would be a south-east, east and a north-east?

A I think it's designated, four portions, north, south, east and west. Each isle has a V1, D2.

Q Was there a number or a label to the aisle you went to?

A There may have been.

Q Did you make any notes to the aisle you went to?

A I did not, sir. No sir.

Q Do you have the photographs there?

A Yes, sir.

Q Is this an aerial view of the coliseum; does that show the parking area you went to?

A Yes sir.

Q Can you locate that for us on that photograph, the aisle to which you went; can you locate it; just yes or no?

A No sir.

Q Can you locate for us the parking field that you went to?

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A Yes sir.

Q Can you locate for us -- all right, fine. Would you draw a circle around that?

MR. WEITZ: With your Honor's permission?

THE COURT: I'll tell you what you do Officer, put in north, south, east and west and bear in mind that is on a somewhat -- somewhat on an angle.

Now, would you draw a circle in the general areayou think you went to?

It is so marked 11A in evidence.

Q Now, the circle that you drew --

THE COURT: Is a general area to which he went.

MR. WEITZ: May I know Judge, is it in that circle that the vehicle was located, or is that a circle just indicating the east parking lot?

A It's a general area from recollection.

Q Was the vehicle within the circle?

A I believe so.

Q And Officer, have you been to the coliseum on occasions?

A Yes sir.

Q And these white strips in the parking area here --

A Yes sir.

Q That run in a generally -- on this photograph, north-south direction, those white strips, are those painted lines indicating stalls for parking so to speak?

A Yes.

Q Approximate with an automobile?

A Yes, sir.

Q About how wide would you say the parking is for each spot?

A Ten feet.

Q Ten feet wide?

A Yes, sir.

Q You could count the number of strips and count that area?

A Yes sir.

Q That is where you went to observe the car?

A Somewhere in there.

Q Tell me, when you saw the car what, if anything, you observed about that vehicle?

A That it was a Nassau County Police Highway Patrol vehicle.

Q Do you remember the number?

A 3254.

Q Which way was it facing?

A Facing east.

Q What else did you notice?

A There was some blood on the trunk.

Q Did you determine the type of blood?

A I did not sir, no.

Q Was it done, made a part of your report?

A I don't know sir.

Q Will you look at the document you have in front of you and the report of the investigation you had of the scene, the scientific investigation bureau. Do it a little faster, Officer.

MR. WEITZ: May I read to the officer your Honor. It's in evidence, 12 in evidence.

Q "Human blood, Group A, type HRH Positive. Reddish brown colored stains is noted on left rear fender, left side of trunk, left rear area of Departmental Vehicle 2254. A sample of this stain removed by the SO type H."

Now, this blood was the blood of George Haber, wasn't it, sir?

A I don't know, sir.

Q Now, the Scientific Investigation Bureau made these findings and recorded these findings, that was as an aid to your investigation, wasn't it, sir?

A Yes sir.

Q Because this type of information is significant to you in helping you determine what happened, isn't that so sir?

A Yes.

Q Weren't you interested to know whose blood that was?

A Yes, sir.

Q Well then, I'll ask you sir, wasn't that in fact George Haber's blood?

A It may be, I don't remember sir.

Q You remember it pretty good except thatyou don't remember --

MR. GARDNER: Objection, argumentative.

MR. WEITZ: Withdrawn.

MR. GARDNER: I think the proper procedure would be not to withdraw an improper qustion, but not to ask it in the first instance.

Q There was an area of reddish brown --

MR. WEITZ: I am reading paragraph F, Scientific Investigation Bureau.

"Brown stain approximately three inches in diameter noted on the ground inside the outline of a figure drawn on cement."

Is that the figure of where George Haber's

body laid?

A Yes, sir.

Q This stain is located 215 feet 35 inches south 39 feet 4 inches west of the parking lot, three east. A sample of this stain is removed by writer and later treated and determined to be human blood. Same blood that was found all over the car, right sir?

A Yes sir.

MR. GARDNER: Objection to all over the car.

Q Left-side trunk, left rear area of roof of departmental vehicle 2254, true?

A Yes sir.

Q Blood that was found by the body was the same blood that was found on the automobile, true?

A Yes sir.

Q Officer, do you have an opinion now as to whether the blood that was found on the automobile was George Haber's blood?

A An opinion, yes sir.

Q Was it George Haber's blood?

A Yes, sir.

Q When you arrived there Officer, was the right front side door open?

A I don't remember, sir.

Q Were you there before or after the Scientific Investigation Bureau; who arrived first?

A I don't remember.

Q I'll read to you from the Scientific Bureau report, Plaintiff's Exhibit 12 in evidence, paragraph A second page.

"Departmental vehicle facing an easterly direction, right front side door open, left rear window shattered, examination of this window shows greater to be on inside window indicating force came from without."

Do you remember that, Officer, the door was open?

A I don't remember if the door was open.

Q "Examination of rear seat reveals a bullet hole of entry on the top of the rear seat approximately 26 inches to the right of left edge of seat, approximately 3 and a half inches to rear of forward edge of seat. A bullet hole exit is noted on the right side of rear seat with a deformed point 38 special caliber lead bullet being recovered on upper edge, rear floor of vehicle adjacent to right rear door. This was removed by writer and sent to the laboratory for further examination."

Officer, do you have an opinion whether that bullet came from a 38 caliber weapon fired outside the car?

A An opinion, yes sir.

Q What is your opinion?

A Yes, it was.

Q Officer, do you have an opinion as to the direction that bullet came from?

A No sir. I do not.

Q Officer, did it come through the door itself, or from above the door?

A I don't know sir.

Q Officer, did you find any bullet hole in the door?

A I don't remember sir. That was handled by the SIB.

Q In trying to determine what happened Officer, weren't you interested to know what the angle of the bullet was as it entered the automobile?

A I was interested in what the Scientific Investigator could tell me.

Q Weren't you interested to know the angle and the path of the bullet as it went through the window and into the seat, front seat?

A That is a scientific --

Q Just yes or no?

A I may have asked him -- yes.

Q Did you ask him?

A I don't remember.

Q Did you make any record with a note?

A There would have been no note, sir.

Q Maybe I misphrased the question.

Did you make any record of the answer?

A His report speaks for itself. I don't have any notes of what he did at the scene, sir.

I arrived at the scene and left and went to the hospital.

Q And that was not for the purpose of taking a statement from Sergeant Salmier, was it?

MR. GARDNER: Objection, your Honor.

THE COURT: Sustained.

Q Well, you told us earlier, didn't you, that you didn't go there for the purpose of getting a statement?

MR. GARDNER: Objection.

THE COURT: Sustained.

Don't do it more than once.

MR. WEITZ: Repetitious?

THE COURT: Repetitious.

You had done it once already.

Q When you went to see Sergeant Salmier at the hospital where was the body of George Haber?

A In the very next room, that is the reason for my visit to the medical center. I was not aware at that time that George Haber was deceased, that was my purpose for going to the hospital.

Q Were you a member of the Homicide Squad when you went down on this call?

A Yes, sir.

MR. WEITZ: May I have a moment, if your Honor please?

Q Officer, are you familiar with something known as a blotter entry book?

A I am familiar with a blotter, yes sir. And entries made in a blotter.

Q And that would tell us whether you were sent out to investigage a homicide, wouldn't it sir?

MR. GARDNER: Objection to the form.

THE COURT: Would it give that information?

THE WITNESS: No, sir.

Q Would it give the information as to -- well Officer, is a blotter entry made when an officer is sent out to investigate an event, an occurrence?

A Well, when a request is made for a police officer or officers, there is an entry made there, it doesn't mean there is a death because of a request for homicide.

Q Would that blotter entry the purpose of the request?

A No sir.

Q Who keeps them?

A The Police Department, County of Nassau, New York.

THE COURT: Do you mean no sir, or not necessarily?

THE WITNESS: Not necessarily.

Q Officer, you were notified of this shooting at 15 minutes after midnight on September 30, D 72?

A I said sometime between midnight and 1:00 a.m. sir.

Q And Officer, Dr. Coulty of the Nassau County Medical Staff pronounced George Haber dead at 20 minutes before midnight of Sepgember 29, 1972.

MR. GARDNER: Is that a statement?

Q Isn't that true, would you look at your report sir?

Detective Division Supplementary Report. I believe the page number is 2 which follows page 1A. Did you look at it Officer?

A Yes, sir.

Q According to your own report officer, he had

been pronounced dead 35 minutes before you were told to go and investigate the case. Isn't that so, sir?

A Yes, sir.

(Cont'd on next page.)

Q Now, coming back to the scene. This police car is 2254, Car Number 2254. Did you inspect the automobile; did you look at it?

A I looked at it, I didn't inspect it.

Q Did you recognize it as a standard Nassau County Police Car detailed for traffic control?

A The standard Nassau County Highway Patrol Car.

Q You know that by the color, right?

A Yes, sir.

Q And it was a four door car?

A Yes, sir.

Q There is room for two people to sit in the back, true?

A Yes, sir.

Q And, Officer, is it equipped with an ignition?

A Yes.

Q And is the ignition on the customary side of the steering column, on the right-hand side as the driver sits behind the wheel?

A I believe it was, yes.

Q I show you this photograph and ask you if you recognize that as being the interior?

MR. WEITZ: May I identify it, your

Marked. Plaintiff's Exhibit 110 in evidence.

Q The interior of the automobile you saw at the scene?

A Yes, sir.

Q Was that car equipped with a radio?

A Yes, sir.

Q And flashers?

A Yes, sir.

Q The front is a two-seater, correct; with console in between?

A Yes, sir.

Q Now, did you look inside the car, Officer?

A I looked. Yes, sir.

Q Did you find the grip off the handle of Officer Salmier's weapon?

A No, sir.

Q Did you know that the grips, both the left and right grip had come off the officer's weapon?

A I learned that later on.

Q Did you know that the left grip of the hand-gun was recovered from the rear seat of the vehicle?

A I learned that later on.

Q And did you know that the right grip was recovered from the right seat of the vehicle?

A Yes, sir.

Q And do you know, did you know that Officer Salmeir gave testimony, or examination before trial at which he said that he struck this decedent with --

MR. GARDNER: I'll object to the form of the question.

THE COURT: Sustained.

Q Would that have been any significance to you in determining the events?

MR. GARDNER: Objection.

THE COURT: Sustained.

MR. WEITZ: I'll rephrase it.

Q Did you ask any questions to find out how the gun grip, the left and right grip happened to be in the automobile?

A I was informed by a supervisor how they were in the automobile.

Q Who was the supervisor?

A Detective Sergeant Dempsey.

Q Was he with the Nassau County Police Department now?

A Yes. He is a supervisor of the Homicide Squad.

Q Was he your supervisor?

A Yes, sir.

Q Is he the superior who questioned Sergeant Salmeir in this case?

A One of them.

Q Who else questioned Sergeant Salmeir?

A I don't know.

Q Were you ever permitted to see the report of this questioning?

A No, sir.

Q Is he presently stationed in Nassau County Police Headquarters?

A Yes.

Q Officer, who is the captain that is in charge of the investigation?

A I don't remember, sir.

Q By the way, Officer, I show you this photograph, Defendant's 11H in evidence. Are you shown on any of those pictures?

A Yes.

Q Would you put a little arrow next to where you are in that photograph?

A Yes, sir.

Q Do you have a red pencil?

A Yes, sir.

Q And does this -- would you please identify for us the other three men in plainclothes who are standing next to you in that photograph?

A Detective Sergeant John Renaldi.

Q Is he presently with the Nassau County Police Department?

A Yes, sir.

Q What was his function?

A He was supervisor of the Third Squad, Detective which the Coliseum falls in their jurisdiction.

Q Who is --

A Sergeant Cox. Presently retired.

Q Do you know where he is?

A Seacliff or Glen Cove, New York.

Q What was his function in the investigation?

A Duty supervisor.

Q What is that, sir?

A To respond to serious crimes, investigator.

Q What is his first name?

A Leonard Cox, and Detective Chief Inspector Proctor.

Q Is he still with Nassau County?

A Yes, sir, he is.

Q Is he still the Chief Inspector?

A Yes, sir.

Q Where is he stationed?

A He is in charge of our Juvenile Aid Bureau.

Q What is his first name?

A I don't know.

Q What was his function at that scene?

A County Supervisor.

Q What is that mean?

A Supervisor of police activity for the County of Nassau for that particular night.

Q Now, Officer, do you know if the County Supervisor, Chief Proctor, was there when you arrived on the scene, or after?

A I don't know.

Q Do you know if Chief Proctor discussed with Sergeant Salmeir what happened?

A I don't know.

Q Did you ask Chief Proctor if he had any information to give you?

A No, sir.

Q Are there any other police personnel in this photograph that you recognize, sir?

A It's possible that the uniform sergeant might be Sergeant Robert Green.

Q That is the gentleman in uniform and you recognize him as Sergeant -- does he have sergeant stripes?

A I believe it's Robert Green.

Q The other civilians behind Mr. Green?

A I don't know who they are, I can't identify them.

Q The truck with the flasher behind those civilians?

A Yes, sir.

Q Do you know what that truck was, or not?

A Departmental Vehicle, 2449.

Q What is Departmental Vehicle 2449?

A A mobile crime lab.

Q What equipment is contained on such a vehicle?

A A great deal of equipment to be exact.

Q Is that something you use, or part of the Scientific Investigation?

A Scientific Investigation.

Q Officer, in Plaintiff's Exhibit 11C in evidence, this photograph, there is a plaque bearing the letter A, Do you know what that letter stands for?

A It's a letter signed by our Crime Scene Section of S.I.B., so they can denote on their report what letter A stands for, that is A would be assigned a particular

thing in this photograph. General scene of the deceased.

Q Is it a way of recording photographs; A, B, C, D, E, F?

A No, sir, photographs are numbered on the back.

Q Now, Officer, are you familiar with the cartridges or bullets -- is cartridge the entire bullet or just the back end?

A The entire bullet.

Q Are you familiar with the cartridge that is used in a .38 special caliber load trooper model?

A I am familiar with the .38 caliber special.

Q What is the weight of such a slug?

A The actual weight, I don't know.

Q Now, Officer, do you have any record or any knowledge as to what was done with the fingernail scr gs from the hands of the deceased?

A It went to the S.I.B., that is all I remember.

Q Now, did you examine the body of George Haber?

A Yes, sir.

Q Did you make a report of your examination of the body of George Haber?

A No, sir.

Q What did you look for when you looked at George Haber's body?

A How many holes there were.

MR. GARDNER: If your Honor please, I note the father and sister are still in court. I want to bring to your attention if you want to proceed along these lines --

MR. WEITZ: Let them step out.

Q What were you looking for when you looked at the body?

A To see what injuries were obvious to see, if there was an entry and exit.

Q Were you looking for powder burns?

A Yes, sir.

Q That would be indicative to you that somebody fired a weapon, true?

A Yes, sir.

Q Did you find any powder burns on George's hands?

A I don't remember, sir.

Q If you would have found powder burns on his hands, you would have made a note of it, wouldn't you?

A It would have been made by the Medical Examiner, not me.

Q If you, in your investigation found powder burns on George Huber's hands, that would have been

THE COURT: Which are you doing; if it's a hypothetical, I'll sustain it.

Q I show you Plaintiff's Exhibit 20 for identification and ask you if you recognize this to be a report of the autopsy in this case?

A I portion of it. Yes, sir.

Q Does it include the decendent's hands?

THE COURT: Listen, gentlemen, I don't think we're going to get finished with this witness tonight. We'll suspend now until Monday morning, we'll resume on Monday morning at 9:45. I apologize for the lack of witnesses here this morning which had nothing to do with the Court's schedule. We were here trying to get things going at 9:45, we'll try to be prompt with you Monday morning. 9:30 downstairs, 9:45 up here.

You'll have to come back on Monday morning.

THE WITNESS: Yes, sir.

THE COURT: Your office has been subpoenaed, and there are still eight or nine records they're supposed to produce which they haven't produced. Maybe you

can give them a hand and make sure they're here. I think somebody should come and identify those records if you're not familiar with them.

THE WITNESS: I am familiar with my reports.

THE COURT: If you're not familiar with them, you should send somebody in here who is familiar with them to identify them, otherwise we are going to delay this trial, and if this trial is delayed any further, I am going to start imposing fines on the individuals that are guilty of it.

(Court adjourned to Monday, May 3, 1976 at 9:45 a.m.)

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(Witness resumes witness stand)

CROSS-EXAMINATION

BY MR. WEITZ: (continued)

Q Now, Officer Fenn, when you were testifying yesterday --

THE COURT: Thursday.

MR. WEITZ: I'm sorry, Judge; Thursday. We suspended, we were waiting for some records. They apparently have arrived now. I'll be asking you some questions relating to some part of this record, sir.

A Yes, sir.

MR. WEITZ: May I ask, your Honor, I'll be handing him certain things coming from folders.

THE COURT: It might be wise to mark them for identification so we know what you are talking about.

MR. WEITZ: May we have this folder marked witness list, marked for identification and content as one exhibit.

THE CLERK: Plaintiff's 20 for identification.

(So marked.)

CROSS-EXAMINATION

BY MR. WEITZ: (continuing)

Q Officer, I show you that folder, Plaintiff's Exhibit 20 for identification, is the writing in there your writing?

A Two pages, are sir.

Q Which two pages are yours?

A (Indicating to counsel.)

Q And the other pages, who are they by?

A I believe an assistant district attorney.

MR. WEITZ: These two papers can we have marked 20A?

THE CLERK: One sheet ten ten seventy two marked as Plaintiff's Exhibit 20A for identification.

One list marked for identification as Plaintiff's Exhibit 20B.

(So marked.)

MR. WEITZ: In the interest of time, can I have two others marked for identification and then hand them up?

THE CLERK: One timetable file marked for identification as Plaintiff's Exhibit 21.

Batch of records marked for identification as Plaintiff's Exhibit 22.

(So marked.)

BY MR. WEITZ:

Q Officer, as part of the regular course of your business in investigating a homicide, do you prepare a time table?

MR. GARDNER: Objection as to form, your Honor.

THE COURT: You asked him what part of his duties.

MR. GARDNER: He's concluding, if your Honor please, the question investigation homicide, attempting to influence the jury that a homicide was committed.

THE COURT: The jury is more sophisticated than that. I've told them now what Mr. Weitz says is not evidence.

MR. WEITZ: I'll withdraw the word.

In the course of your duties in investigation, as a member of the homicide bureau, when you go out on an investigation, do you prepare a timetable?

A Sometimes I do, another officer does sometimes.

Q Is it part of the regular investigation where somebody has died as a result of a gunshot that such a thing be done?

A Yes.

Q Was it done in this case?

A I believe so.

Q Is that what you have in front of you as Plaintiff's Exhibit 20 for identification?

A Yes.

Q Did you do that or one of your associates?

A I did not do it.

Q Is that part of the regular course of business to

make that timetable?

A Yes.

MR. WEITZ: I offer that in evidence.

THE COURT: Show it to Mr. Gardner.

(Counsel looking at Exhibit 21.)

MR. GARDNER: No objection.

THE CLERK: Plaintiff's Exhibit 21 received in evidence.

(So marked.)

Q Officer, before you came to this scene there were other police officers that came to the scene; isn't that true?

A Yes.

Q Tell this Court and jury according to police time-table, who the other officers were, the other officers who came to the scene and what their position was at the time that they ame?

A From the timetable, 11:30 in the p.m. a patrolman called Police Officers O'Neill and Ryan from the Narcotics Bureau. At 11:40 p.m. Detective Sergeant Rinaldi and Detective Metiz.

Q Who are they?

A Third squad supervisor and third squad detective.

Q Are they in charge of investigating crimes taking place in the third squad area?

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A They could have been, sir. At twelve midnight, Detective Curran and Police Officer Buchan, Shield 205, they are from our scientific investigation crime scene section.

At twenty five after midnight Detective Sergeant Copser, Shield number 16, he may have been the duty supervisor.

Q Who else?

A At twenty six after midnight, Deputy Inspector Engle, deputy commanding officer of the Third Precinct; at twenty seven after midnight, Detective Fehn, myself.

Q Who prepared that timetable? Do you recognize the handwriting?

A I do not.

Q Who else at 12:30?

A Chief Warselli and Chief Procter; Warsell was Deputy Commissioner and Procter was County Supervisor for that night; at ten minutes to one, Detective Sergeant Dempsey, Shield number 191 from Homicide, he was my supervisor and superior officer. At 1:05 in the a.m., Chief McGinnis, commanding officer Highway Patrol Bureau; at 1:08 Detective Jannelli, firearms expert, from the Scientific Expert Bureau; at 1:09, assistant district attorney F. Dillon; also at 1:09, Captain Chamante(ph) from the Highway Patrol Bureau; at 1:15 Chief Curran, he's the Chief of the Detectives, Nassau County Police; 1:15 Detective Rusch; at 1:30 Chief Grant, Chief Grant I believe

was chief of the district at the time; at 2:16 a.m., Police Officer Sommers, Shield 1240 -- I would assume to remove department vehicle 2254.

Q What is the purpose in your investigation of this timetable?

A To show arrivals of the members of the Police Department at the scene of an investigation.

Q Would it be necessary to put down everybody that appeared there on this timetable?

A Should have been; yes.

Q Officer, do you know that someone was left out of this timetable?

MR. GARDNER: Object to the form.

THE COURT: He's asking him does he know whether anybody is left out.

MR. WEITZ: He's an officer who arrived at the scene after other people.

A There may have been, I don't know.

Q Do you know, sir, before any investigation was done -- do you know whether Mr. Sehlmeyer had a conversation with any member of the Police Department?

A I can assume so. I don't know it to be factual.

MR. WEITZ: May I have this marked for identification

THE CLERK: One file marked for identification as --

MR. WEITZ: Let me have it back, I withdraw it.

Officer, you told us that you did not interview Mr. Salmia; is that true?

A That night; yes, sir.

Q Now, Officer, I show you, take a look at the document with the rubber band, do you recognize what that is, sir?

A It appears to be a xerox from a Police Department blotter.

Q Those are the things we talked about Thursday?

A Yes.

Q Tell us, these entries, they are made at the precinct; is that correct?

A Yes, sir.

Q And they recorded the time when certain calls are made, to and from the precinct?

A If it comes through the precinct, it affects the precinct.

Q Part of the regular course of business to do that; right, sir?

A Yes.

Q When a police officer goes out to make an arrest, is he required to call in to the precinct he's in?

A Or be physically present with the prisoner.

Q Rather than burden the whole record, I want to offer just the entries for September 29th and 30th, night of September 29th and 30th. I think the pages are numbered.

MR. GARDNER: The only problem that I have, there are names of individuals on these receipts as persons having been arrested. I don't know what the disposition may have been. I'm just reluctant --

THE COURT: He's not offering it.

MR. GARDNER: Only the timetables.

THE COURT: Before you show it to the jury, can you make arrangements to blot out --

MR. GARDNER: Then I have no objection.

MR. WEITZ: This was out of 22 for identification.

THE COURT: Mark it 22A in evidence.

THE CLERK: Seven pages received in evidence as Plaintiff's Exhibit 22A.

(So marked.)

Q Officer, even when you investigation you're just supposed to call in and let the precinct know about that?

THE COURT: As to what?

Q An officer going out to investigate a complaint.

MR. GARDNER: Going out where?

THE COURT: You must have phrased several questions in your mind and came up with this.

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MR. WEITZ: I'll rephrase it.

A police officer in the County of Nassau on September 29th of 1972, he received a complaint from a pedestrian and he's in a position to make a radio call. Before he investigates an occurrence, is he required to notify his superiors where he is going and for what purpose?

A Not necessarily. The only time he would have to is if he was going to leave his investigation, be out of service for a few minutes, if he could handle the situation and stay in his investigation, he would not have to contact anyone.

Q In this case, are you familiar with these matters?

A Yes.

Q Take a look at page 288, locate for us the first entry and the time of entry relating to Sergeant Sehlmeyer on the night of September 29th at any time from 10:30 thereafter. Look at page 29 --

THE COURT: Wait a minute. Is there some kind of negligence in keeping the books and records?

MR. WEITZ: I'm going to be as brief as I can.

THE COURT: Have you ever had any supervision of any police work yourself?

MR. WEITZ: Have I supervised any police officers? I have. I have been through all of this too. The entire

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documents that came in. I was trying to speed it up for a later point. I just want to fix the time of the first call when it came in.

THE COURT: I don't see it but go ahead.

MR. WEITZ: I'm just trying to set the time, Judge. What time was that?

A Eleven twenty two in the p.m.

Q Is it written as twenty three twenty two?

A Yes.

Q And that was signal 14?

A At twenty three twenty two, signal fourteen CB--

Q Tell us what the abbreviations stand for?

A It would be a CB operator, 91 by tie line TPI. Report card 2254. It might be request or repeat signal 14 at the Nassau Coliseum; cars 312, 314, 315 by radio.

Q Does that mean that those police cars were dispatched to that area?

A Yes.

Q Is signal 14 an officer calling for assistance?

A An officer needs help.

Q And you say this is by tie line. Is that something that was recorded in the precinct that was received from some other police?

A It came from some other police or communications

bureau and by telephone to the precinct.

Q Now, at twenty three thirty or eight minutes later, is there another entry relating to this occurrence?

A Yes, sir.

Q What is that entry?

A At twenty three thirty, Sergeant Green.

Q Who is that?

A A uniformed sergeant assigned to the Third Precinct, but it appears to be with T.

Q What does that stand for?

A Request detective at scene; Detective Petrone notified. He's a detective assigned to the Third Squad, Nassau County Police.

Q Now Officer, in conjunction with the work that you did preparing witnesses, lists of possible witnesses to this occurrence, did there come a time when you made evaluation as to witnesses who would be favorable to Sergeant Sehlmeyer and those that would be unfavorable to Sergeant Sehlmeyer?

MR. GARDNER: I object to the form of the question. I object to the form of the question.

THE COURT: Is this the nature of some sort of opinion by this witness?

MR. WEITZ: I'll put it another way.

THE COURT: I think you might.

BY MR. WEITZ:

Q At some time did you cause a search to be made to see if there were any criminal records against any of the witnesses whom you interviewed in this case?

A Yes, sir.

Q And you limited your search in your investigation as to only those people you thought might give testimony detrimental to Sergeant Sehlmeyer, didn't you?

A No, sir.

MR. WEITZ: May I have this marked for identification?

THE CLERK: One file marked for identification as Government's Exhibit 23.

(So marked.)

Q I show you this file marked 23 for identification, do you recognize that file, Officer?

A Some of it, yes, sir.

(Continued on next page)

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Q And you labeld that file witnesses against?

A Yes.

Q And you sent a request out to those people to see if they had criminal records?

A Yes, sir.

Q They didn't have criminal records, did they?

A I don't remember.

Q Take a look at the file.

MR. GARDNER: I see no relevancy to this line of inquiry. It has nothing to do with what occurred at the Coliseum.

MR. WEITZ: It goes to credibility of witness.

THE COURT: The problem is you called this witness, and you intend to impeach him.

MR. GARDNER: He didn't ask him what happened or what he observed.

THE COURT: I must say I don't see the relevancy of it. I'll have to sustain the objection.

MR. WEITZ: I'll offer the file in evidence.

MR. GARDNER: If it's irrelevant, it's irrelevant, same objection.

THE COURT: No; I'll sustain the objection.

Q Officer, were statements taken of witnesses by the Assistant District Attorney Dillon who appeared at the

scene of this accident?

A He took questions and answers statements.

Q Did he do that during the regular course of the investigation of this occurrence?

A Of his investigation; yes, sir.

Q And you were actually present when a number of these statements were taken?

A When some of them were taken; yes, sir.

Q And that was part of the regular business of the Homicide Bureau to be present when those interviews were conducted?

A Yes.

MR. WEITZ: Your Honor, I wish to offer in evidence the statements, 14 transcripts of statements taken in this case of various witnesses.

MR. GARDNER: Notwithstanding what the statements reflect. If your Honor please, these are hearsay statements by declarants who had no duty to give statements. It being hearsay, I say bring the persons in, tell the jury what they saw, heard, let them be cross-examined. It's an attempt --

MR. WEITZ: 803A, your Honor.

MR. GARDNER: I see no exception to the hearsay rule to which they will come in.

17 Fehn-cross

THE COURT: He's entitled to be heard on the subject.

MR. GARDNER: And might I refer your Honor to 805 relative to hearsay statements contained within hearsay statements.

THE COURT: This isn't that kind of a record.

MR. GARDNER: If your Honor pleases, I would request that the Court look under 803(c).

THE COURT: These are witness statements. Objection sustained.

MR. WEITZ: May we have them marked for identification.

THE COURT: Yes, you may.

Mark it for identification.

THE CLERK: Fourteen statements marked as Plaintiff 24 for identification.

Q Officer, the investigation by the District Attorney, is that a -- when somebody is killed, is that a regular activity of that office to make such an investigation, take such statements?

A Yes.

Q And is it part of the regular business to take these closer to the time to the actual event?

THE COURT: Have you heard Johnson against Lutz?

MR. WEITZ: I want to make sure that I'm doing it correctly, Judge.

THE COURT: All right, you better go read Johnson against Lutz.

MR. GARDNER: Kelley against Wasserman case. I thought your Honor already --

THE COURT: I've ruled on it.

MR. WEITZ: I'm offering it again under 803(c).

THE COURT: Same ruling.

MR. WEITZ: And of course, 24, Judge.

THE COURT: Same ruling.

Q Officer, did you ever recover the bullet that went through George Haber's body?

A I don't believe so, sir.

Q Officer, did you at some time take possession of Sergeant Sehlmeyer's weapon?

A I did not.

Q Did you take it and turn it over to the SIB?

A I never had that weapon in my custody.

Q Did you ever see the weapon on that night?

A I Believe it was the next morning, sir.

Q Where was that, the SIB office?

A Yes.

Q Could you describe that weapon for us.

A I believe it's a Colt Trooper, 4 inch barrel, blue.

Q Do you know how that gun works, officer?

A In what respect?

Q How one fires it?

A Yes.

Q How is it fired?

A Either single or double action.

Q Please tell this jury what single action means.

A Single action is taking the thumb, pulling the hammer back and squeezing the trigger and it will discharge.

Q What is a double action?

A Double action is just taking either a finger and squeezing the trigger and it will come back and eventually coming down on the bullet.

Q In order for a weapon of this nature to be fired the trigger must be pulled?

A Yes, sir.

Q Does it have an internal safety?

A Nassau County weapons are supposed to have an internal safety.

Q And what sort of internal safety was this weapon supposed to have?

A It's called the safety bar.

Q Would you say that louder.

A A safety bar.

Q Tell the jury what a safety bar is.

A As long as a finger is --

MR. GARDNER: It's interesting, it's not material to the lawsuit. There is nothing that I could see from the pleading about any detective weapon.

THE COURT: He could answer.

A If the hammer is pulled back and a finger is on the trigger the safety bar is lowered and it will fire. If when I cock the hammer, pull the hammer back and I take my finger out from the trigger, the hammer will fall on the bar and not hit the primer or the bullet.

Q I show you this photograph, officer, this one and that one (indicating) and ask you to look at it and tell me if you recognize the contents of those photographs?

A Yes.

Q Are those fair and accurate pictures of the police car 2254, certain portions thereof as they appeared on the night of September 30th when you came to the scene?

A Yes, sir.

MR. WEITZ: I offer them in evidence.

THE COURT: How many are there?

MR. WEITZ: Three.

THE COURT: Twenty five.

THE CLERK: Three photographs marked for identification --

MR. GARDNER: No objection.

THE COURT: Received.

MR. WEITZ: I hand you a package.

THE CLERK: Received in evidence as Plaintiff's Exhibit 25.

Q I offer you a package as well, open it up, tell me if you recognize the contents.

THE COURT: Maybe you ought to mark it 25A,B and C.

THE CLERK: Three photographs marked as Plaintiff's 25A, B and C.

Q Do you recognize the contents of that package?

A I recognize what it is, yes, sir.

Q Are those the shell casings and one of the bullets, remains of one of the bullets that were fired on this evening?

A I don't know, sir.

Q Isthere a mark on the outside of that?

A Yes, sir.

Q Officer, you are familiar with the Nassau County Police Department file concerning this case, are you not?

A Yes, sir.

Q And it's part of your investigation --

MR. GARDNER: If your Honor please --

MR. WEITZ: You did in fact recover and look at --

MR. GARDNER: If your Honor please, I don't know what thepurpose of going through these little bits and pieces, there is no question in here that Mr. Haber died on that evening and it was as a result of a gun shot. I don't see what the significance if those were the bullets or if those weren't the bullets.

THE COURT: Neither do I, but he's allowed to --

Q Are those the books you had in your file relating to this event?

A They were in the SIB file, they may be.

Q Officer, I want to show you 25B. That dent in the vehicle, do you know what that came from?

A No, sir; I do not.

Q I'm referring specifically to the left rear door of the vehicle?

A Yes, sir.

Q Officer, does 25A show where one of the bullets entered of the rear seat of car 2254?

A It shows where something had been marked, found

on the rear seat.

Q Did you look at the rear seat of this vehicle?

A I did not examine this vehicle. It was being safeguarded.

Q Did you ever look at these photographs in your investigation?

A I'm sure I did.

Q You have no present recollection?

A No.

Q Were you ever present when Sergeant Sehlmeyer was introduced by anyone else, anyone concerning what happened on this night?

A I may have been, sir.

Q You have no recollection?

A I don't recall.

Q Officer, did you take your self statement, written statement from persons purporting to be witnesses to this occurrence?

A Yes, sir.

Q Do you know by looking at the witness list whose statements you took?

A No, sir.

THE COURT: No point in offering those statements; on the same ruling they are going to apply.

24 Fehn-cross

MR. WEITZ: May I make a formal offer of proof?

THE COURT: Just mark it for identification if these are the ones he took.

MR. WEITZ: I'll offer them all including the ones he took.

THE COURT: The same ruling applies as in Johnson against Lutz.

Q Officer, I show you a document -- may I mark it for identification?

THE CLERK: One folder marked for identification as Plaintiff's Exhibit 26.

(So marked.)

Q Now Officer, before you look at it, let me ask you a few questions.

As part of the regular course of business of the Homicide Squad, Nassau County Police Department, were statements taken from people concerning what they knew of the offenses on September 29, 1972?

A Yes, sir.

Q And was this part of the business of the Police Department, Nassau County, and particularly the Homicide Bureau to interview people and reduce to writing the statements given by such persons?

A Yes.

Q Is that done in the regular course of business of the Homicide Bureau?

A Yes.

Q Are those papers reduced to writing, put in folders such as the type you have in front of you and labeled with the witnesses name?

A Sometimes.

Q And in fact, in this case, was that done, statements were reduced to writing and put into folders as the type you have in front of you with the witnesses name written on the folder?

A I believe so.

Q And officer, were you assisted by other police officers in making your investigation?

A Yes; numerous.

Q Is that a statement you took, officer, in the course of your work in investigating this case?

A Yes.

Q When did you take that statement?

A First of October.

Q And you have the individuals who signed the statement?

A Yes.

Q Was that individual also questioned by the

assistant district attorney Dillon?

A I believe it was.

MR. WEITZ: I offer it in evidence.

MR. GARDNER: Objection.

THE COURT: Objection sustained.

MR. WEITZ: I don't have anything else of this witness.

THE COURT: I have six minutes according to the clock and Mr. Dawson is going to bring a whole lot of people in here.

THE CLERK: One transcript marked for identification as Defendant's Exhibit E.

REDIRECT EXAMINATION

BY MR. GARDNER:

Q I show you Defendant's Exhibit E and I ask you whether or not you recognize it, and if you do, please tell us what it is.

A It is a typewritten transcript of a request for assistance transmitted from Car 2254 by an unknown female on the night of September 29, 1972.

Q When you made reference to platter which said there was a receipt of a fourteen call from some other source, can you tell us by looking at that document in front of you what that other source was?

A I would say it came from a radio, CB.

Q And tell us what radio CB was as compared to where the blotter was.

A CB is located at 1490 Franklin Avenue, Mineola; from there all calls are transmitted to us in sector cars to CB located in Mineola, and Mineola will call whatever command he may belong to and notify his command what assistance or what he may require.

Q Tell us, officer, what the radio message was that was received at police headquarters.

MR. WEITZ: The documents speak for themself.

MR. GARDNER: Offer it in evidence.

MR. WEITZ: I have no objection as to editorialization. I have no objection to the contents. I may have an objection to the manner in which it's typed. I haven't seen it. There may be words printed in capital letters.

THE COURT: If you have no objection.

MR. WEITZ: I object to the editorialization.

THE COURT: As to what is readable. I can't quite see, maybe I don't understand the word editorial.

(Continued on next page)

270

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R 3

28 MR. WEITZ: May we approach the bench?

(Whereupon a side bar conference was held.)

MR. WEITZ: I have no objection to this being read but certainly, this young girl didn't scream help in capital letters, that's obviously an editorialization; it's the kind of thing when I raise my voice --

THE COURT: This is the way it was typed up, maybe it was put that way for emphasis.

MR. WEITZ: It certainly was. I don't think the man who was typing this up had a right to do that; nobody said was simultaneous with the event.

THE COURT: Was it?

MR. GARDNER: Sure.

MR. WEITZ: He doesn't know, he wasn't there.

THE COURT: It comes with official records, we could go back.

MR. GARDNER: We could go back with the official records.

THE COURT: He has no objection if it's retyped or in lower case letters.

MR. WEITZ: I'll read it then, your Honor.

THE COURT: It will go in and you fellows work it out.

THE CLERK: Defendant's Exhibit E was received in evidence.

(Whereupon side bar conference was concluded.)

REDIRECT EXAMINATION

BY MR. GARDNER: (cont'd.)

Q Read what the transcript was, with no emphasis, just read the language.

THE WITNESS: Transcript request for assistance, transcript transmitted from car 2254 by unknown female voice, September 29, 1972, at approximately 2320 hours; 320, 320 to headquarters, description of a vehicle on last transmission, dispatcher of vehicle is the '63 Chevvie, 320, okay. Female voice -- signal 14 at Coliseum, please assist the policeman, person assist car 2254 -- (unreadable) -- (another sentence unreadable) -- assist car 2254, dispatcher 2254, this is headquarters, female voice -- unreadable -- would you please help, help, help.

MR. GARDNER: The number of that police vehicle, was that the police vehicle that was assigned to Sergeant Sehlmeyer and the police vehicle that you saw at the Coliseum?

A 2254.

REDIRECT EXAMINATION

BY MR. GARDNER: (cont'd).

Q Where it says in there unreadable, tell us what that means?

A Apparently they were unable to read.

Q It means unable to hear, illegible.

By the way, the photographs and other material that was handed to you by Mr. Weitz from these folders, do you know where these folders came from?

A Either the County Attorney's office or Police Headquarters in Mineola.

Q They were delivered to you today?

A Yes.

Q Given to Mr. Weitz?

A Yes.

Q One last question. As far as the safety of the weapon was concerned, that safety has to do if the gun is cocked back and a finger is taken off the trigger and it's put back in the holster, it doesn't fire. As far as anybody's finger is on that trigger it can go off by depressing the finger?

A Yes.

MR. GARDNER: No further questions.

RECROSS EXAMINATION

BY MR. WEITZ:

Q You are saying a finger must be on the trigger for that weapon to fire; true?

A Yes.

Q Because you could actually pull a hammer back and let that go and that safety, stel safety bar would come back up into place.

MR. GARDNER: Objection, it's argumentative.

MR. WEITZ: I have nothing else of this witness. I'll withdraw it.

(Court stood in recess for the day.)

* * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

HABER, :

Plaintiff, :

-against- : 73C1408

NASSAU COUNTY, :

Defendant. :

- - - - - - - - - - - - - - - - - - x

United States Courthouse
Brooklyn, New York

May 4, 1976
9:30 o'clock a.m.

B E F O R E :

HONORABLE THOMAS PLATT, U. S. D. J.

HARRY RAPAPORT, CSR
Acting Official Court Reporter

A P P E A R A N C E S :

HARVEY WEITZ, ESQ.,
Attorney for Plaintiff

JOHN GARDNER, ESQ.,
- and -
BARBARA BILLAVER,
Of Counsel
Attorneys for Defendant.

3 MORNING SESSION 270

(May 4, 1976)

(The following takes place out of the presence of the jury.)

MR. WEITZ: Your Honor, may I interrupt?

THE COURT: Yes.

MR. WEITZ: If your Honor pleases, I have reviewed the pleadings in this case and I have reviewed some of the documents that have been produced as well as recalling to my own mind the Examination Before Trial of the defendant Sehlmeyer, and with respect to what is labeled the third cause of action or the third claim in this case, which essentially sounds in vicious protensities, I would respectfully apply to this Court for permission to withdraw the claim.

THE COURT: I am just waiting to find out what Mr. Gardner has to say.

MR. WEITZ: When I say to withdraw the claim, I mean to discontinue it on the merits.

MR. GARDNER: Your Honor, I have no objection, your Honor.

THE COURT: Then the third claim is out.

I was just starting to dictate the appropriate charge on that claim, so your application is very

timely. I had just gotten out the papers and began to dictate it. That seems to be the easiest one to start with.

(The jury enters the courtroom and the following takes place in open court and in the presence of the jury:)

THE COURT: Good morning, ladies and gentlemen. I think we are ready to go.

MR. WEITZ: Mr. Sehlmeyer, would you take the stand, please.

R O B E R T S E H L M E Y E R, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. WEITZ:

Q Mr. Sehlmeyer, did somebody tell you to put the badge on when you took the stand?

A That is part of the regulations of the Police Department, sir.

MR. WEITZ: If your Honor please, he is being sued here as a defendant.

THE COURT: That is one of the regulations of the Police Department, as I understand, is that the police officers wear their badges when they take the stand.

MR. WEITZ: Is it necessary?

THE COURT: I will certainly not tell the Nassau County Police Department that their regulations are invalid.

MR. WEITZ: Pardon, sir?

THE COURT: I will not declare their regulation invalid.

MR. WEITZ: I didn't ask you to do that, sir.

THE COURT: If Nassau County sees fit that their police officers put on their badge when they take the stand, I think it's a reasonable requirement until somebody shows me law in the contrary.

MR. WEITZ: I might discuss it with the Court later at side bar. I will now proceed with the witness.

Q Mr. Sehlmeyer, you are presently employed by the County of Nassau?

A Yes, sir, I am.

Q And back on September 29th, 1972, were you a police officer with the Nassau County Police Department?

A Yes, sir, I was.

Q And how tall were you and how much did you weight at that time?

A I was six foot three inches and I weighed 180 pounds, sir.

Q About eleven o'clock on that evening were you in the Nassau County Coliseum parking lot?

A Yes, sir, I was.

THE COURT: How old were you on this date in question?

THE WITNESS: Sir?

THE COURT: How old were you on September 29th, 1972?

THE WITNESS: Forty-two years old, sir.

THE COURT: Go ahead.

Q And were you assigned to Car Number 2254?

A For the first time, sir, yes.

Q And at about eleven o'clock on that night, were you parked in the parking lot somewheres?

A Yes, sir, I was.

Q And would you tell us, Mr. Sehlmeyer, where in the parking lot you were parked?

A I was not parked. I was stopped in the parking field approximately northeast of the Coliseum itself.

Q Northeast of the Coliseum?

A Yes, sir.

Q Northeast, you say. Facing in what direction?

A Facing in a generally easterly direction, sir.

Q And when you say northeast -- pardon me.

Was the Coliseum then to the south of your automobile?

A Southwest, sir.

Q Sir?

A Southwest.

Q So that it would be to the right-hand side of your automobile and behind it as you were stopped --

A Yes.

Q -- in the park.

Now, the Coliseum itself, the structure, sits upon a rectangular area, paved area, correct?

A Generally rectangular, yes.

Q And it is set off from the parking lot by that paved area that surrounds it, correct, sir?

A I don't understand the question.

Q Well, if you don't understand my question, I will show you a photograph.

Well, the Coliseum itself is surrounded by a concrete apron. Is that so?

A Yes, sir, it is.

Q And around the apron on all four sides of that square apron you have the parking fields?

A That is correct.

Q Now, with respect to the apron that surrounds the Colliseum, the concrete apron, was that also southwest of your vehicle as you were parked?

A Part of that was southwest of the Coliseum. It's surrounded on all four sides, sir, on all sides, sir.

Q And that was also to the southwest of your car? That's what I am trying to find out, sir.

A Part of it was, sir. Yes, it was southwest, yes.

Q All right.

Now, is there a designation to the area by number or aisle or in any other way to the place you were stopped?

MR. GARDNER: I will object, if your Honor please. We have really no frame of reference to establish what we were talking about, when he was stopped.

MR. WEITZ: We have a time around eleven o'clock, Mr. Garnder.

MR. GARDNER: But in terms of what we are making reference to --

THE COURT: They seem to be getting along all right. I will allow it.

Q Is there?

A Yes, there is.

Q And what is that area called?

A I do not know, sir.

Q While you were in that area at eleven o'clock, were you alone at that moment while your car was stopped facing easterly?

A I was in my car alone, yes.

Q And were there other people in the area walking to and from various places?

A Yes, sir, there were.

Q And were they both men and women, young men -- men and women?

A I saw both male and female, yes.

Q And of a variety of ages?

A I didn't take particular notice to their ages, sir, but I assumed they were all not the same age.

Q And of a variety of mode of dress?

A Again, I would say it's safe to say they were not identically dressed, yes.

Q I am sorry, I can't hear you, Mr. Sehlmeyer.

A It is fair to say they were not identically dressed. There was a difference.

Q Did you see people dressed in dungarees and T-shirts?

A Not that I recall in particular at that particular time, sir.

Q Did you see people dressed in jackets and sweaters?

A I made no particular observation as to how the people were dressed.

Q Your job on that night, you were assigned to the Highway Patrol Bureau, correct, sir?

A That is correct.

Q And your job that night was to provide a detail of men who were assigned to the Coliseum to control traffic, correct?

A That was one of my duties, correct.

Q And while you were stopped at about eleven o'clock, did you encounter two persons who spoke with you? Just yes or no -- withdrawn.

From time to time while you were there, did you speak to different people in the area?

A Yes, sir, I did.

Q Did you speak with any of the private security guards at the Coliseum?

A Not at that particular time, sir, no.

Q All right.

At that particular time did you encounter

two young ladies?

A At approximately eleven o'clock or shortly thereafter, yes.

Q Now, did you speak to one of them or both of them?

A I spoke to both of them, sir.

Q Can you describe the two young ladies that you spoke to?

A The only description I could give you is that they appeared to be in their mid or late teens. They were what I would term normally dressed.

Q Well, what does that mean?

A Well, the clothes, I would assume a teen-age girl would be wearing. There was nothing distinctive to me. The looked like -- they were neatly dressed.

Q Did they in your conversation with them, did they tell you of an incident involving a man in the parking area?

A Yes, sir, they did.

Q And did they indicate to you where in the parking area that incident took place?

A The exact location, no.

Q Did they indicate to you an approximate location where that incident took place?

A No, sir, they did not.

Q I'm sorry?

A No, sir, they did not.

Q Did they indicate to you the time where that incident was alleged to take place?

A They used the word that this man had just --

Q Just yes or no? Did they tell you?

A The exact time, no, sir.

Q Did they tell you in relation to the time they spoke to you approximately how much earlier some incident had taken place?

A No, sir; not in specific terms.

Q And were you in your car when you had this conversation?

A Yes, sir, I was.

Q Okay.

Did you -- was your car equipped with a radio?

A Yes, sir, it was.

Q And in your vehicle, this radio, with whom could you communicate by use of this radio?

A I could communicate with headquarters, to the Communications Bureau.

Q Were you able to communicate with the men in your detail, the thirteen men assigned -- withdrawn.

Were there approximately thirteen or fourteen men under you?

A At the Coliseum detail, yes.

Q Were you able to communicate with them through the use of this car radio?

A Not with them, no, sir.

Q Was there some direct method you could communicate with them?

A I could communicate with the Communications Bureau in Mineola who could in turn then communicate with these men.

Q And how would they communicate with the men?

A Some of the men were assigned to radio motor patrol cars, which are also equipped with radio.

Q Now, is there any other way you could communicate with these men who were assigned to this field?

A Not directly, sir, no.

Q Weren't these men equipped with some kind of walkie-talkie radios?

A Not to my recollection, no, they were not.

Q Incidentally, before testifying here today, sir, Mr. Sehlmeyer, before testifying today did you read anything to refresh your recollection?

A Concerning what matter, sir?

Q Concerning this matter, Mr. Sehlmeyer.

A Oh, I did read this morning, but nothing pertaining to this court action, sir.

Q Before testifying here today -- by that, I mean at any time before getting on the stand, whether it was today, yesterday, the day before, a week before -- did you read anything to refresh your recollection of the events of September 29th, 1972?

A Yes, sir, I did.

Q All right.

Would you tell us what you read?

A I read my statement of Examination Before Trial.

Q You read nothing else?

A Not that I can recall right now, sir.

MR. GARDNER: If your Honor pleases, so that the jury is clear --

MR. WEITZ: If your Honor please, I object to counsel making a statement. The witness has answered the question.

MR. GARDNER: If your Honor please --

MR. WEITZ: This is the --

THE COURT: I will make a statement to the jury.

A portion -- a good portion of the Examination

Before Trial of Mr. Sehlmeyer was read to you last week. That's what he is referring to.

MR. GARDNER: If your Honor please, I would respectfully request your Honor to at least advise the jury what an Examination Before Trial is so that --

THE COURT: I have just advised them.

A good portion of the Examination Before Trial, which is part of the discovery proceedings in any civil case to which both sides are entitled to, was read to you last week.

Go ahead, Mr. Weitz.

Q Officer, didn't you this morning read the Homicide Bureau file in connection with this case?

A No, sir, I did not.

Q When you were sitting at the counsel table with your lawyers this morning, didn't you discuss the Homicide Bureau file with them, with all the papers in there?

A No, sir, I did not.

Q Did you see them reading the Homicide Bureau papers?

MR. GARDNER: I will object, if your Honor please.

Q Did you see that, sir?

MR. GARDNER: I will object. He got his answer. And the fact of the matter, we weren't reading any Homicide Bureau file. If he wants to testify, let Mr. Weitz take the stand.

THE COURT: This is not the purpose of this kind of examination. You are not here to put him on here. Just cross-examine him. If you want some information from him on your direct case, you do that.

MR. WEITZ: I can impeach him, Judge.

THE COURT: You may impeach him, but there is no cause to impeach him at the moment.

Q Officer, is it your testimony then that the only thing you read before taking the stand to refresh your recollection is your deposition?

A That's all I can recall, yes, sir.

Q Well, when did you read that deposition?

A When have I -- I have read it more than once, sir.

Q When was the last time you read it, sir?

A I believe last Thursday or Friday.

Q Now, Officer, these two young ladies that you previously told us about, did they identify this male individual to you in any way?

A They --

Q Just yes or no. Did they?

A Yes.

Q Officer, how many times do you say you read your deposition before testifying?

A Any number of times. I don't know exactly, sir.

Q Officer, remember that was given on January 23rd of 1975. You went to your lawyer's office at 415 Madison Avenue and you were questioned under oath at that time, sir. Do you recall that?

A I recall going to the attorney's office and I do recall giving a statement. But I am not certain as to the exact date it was.

Q Well, sir, at that time didn't you testify that these young ladies did not identify this man here in any way?

MR. GARDNER: I will object to the form of the question.

MR. WEITZ: I will withdraw the question.

Q Sir, I will ask you, in any way -- I will ask you, sir, did you give this answer to this question, Page 51, line 12.

"QUESTION: Incidentally, at the time of that conversation with the two girls prior to your asking

where the man was, did they identify the man in any way?

"ANSWER: No, sir."

Did you give that answer to that question, sir?

A If I did, I do not recall, sir.

Q Do you deny that you gave it?

A I don't recall that, sir.

MR. GARDNER: This has been read. There is no question that that question and that answer among others were given. We can read this or re-read it back to the jury.

MR. WEITZ: If you're conceding it, Mr. Gardner, I will accept your concession.

MR. GARDNER: Why don't you read line 18.

MR. WEITZ: We will get to everything.

Q Did you take the name or names of these two young ladies?

A No, sir, I did not.

Q Did you ever learn their names?

A I believe it was told to me, but I don't recall what it was.

Q Were you in your car when you were told where some incidents had taken place? Were you actually in your automobile?

A Yes, I was.

Q And were you in the driver's seat?

A Yes, I was.

Q Was this a four door car?

A Yes, sir.

Q And where were these women standing when they spoke to you?

A In the parking field roadway or island, if you would like to call it that, that the cars travel to [illegible]t to their parking spaces.

Q Next to the driver's side or on the opposite side?

A Next to the driver's side.

Q Were they standing out the front door where you were seated?

A At the front door where I was seated, sir.

Q And were they facing you as they spoke to you?

A At times, yes.

Q Now, after you had this conversation with these two young ladies, would you tell us, did you proceed some place?

A Yes, sir, I did.

Q And did the ladies proceed with you?

A They did not proceed with me, no, sir.

Q All right.

Before you left to go somewhere, did you make any radio call to your Communications Bureau to inform them that any crime had been committed?

MR. GARDNER: I object to the form of the question, if your Honor please.

THE COURT: I will allow it.

A No, sir, I did not.

Q Did you have anything on the back seat of your car before you left from where you had the conversation? Was there anything on the back seat?

A I do not know, sir.

Q Did you ask these two young girls to get into the car with you?

A No, sir, I did not.

Q The place where you had this conversation with the two girls, was that in an aisle of some sort?

A Yes, sir, it was.

Q And about how wide was that aisle?

A I would only have to estimate. I would say approximately fifteen, maybe a little more feet in width.

Q Was it wide enough for two cars to proceed in the same or opposite directions?

A Yes, sir, it was.

Q And, Mr. Sehlmeyer, when you drove away from

these two girls, at that time, at any time prior to that moment when you drove away, had you had any training by the Department in your power and authority to make an arrest?

A Yes, sir, I have.

Q All right.

Were you familiar with the provisions of, I think it's Rule 17 -- Article 17 of the Rules and Regulations of the Nassau County Police Department?

A I am not aware of specifically what Rule 17 is, sir.

Q All right.

I show you Plaintiff's Exhibit 8 in Evidence and ask you to take a look at it.

(Handed to the witness.)

Q (Continued) Do you recognize it, sir?

A It appears to be a copy of Rules and Regulations, sir.

Q Were you familiar with that regulation?

A Yes, sir, I believe I was.

Q And now when you departed from the place where you had that conversation, did you have a warrant for the arrest of any individual?

A No, sir, I did not.

Q And you did not witness yourself any occurrence involving two young women, did you, sir?

A No, sir, I did not.

Q And as part of your training as a police officer, did you become familiar with the sections of the Penal Law concerning your power to make arrests?

A Yes, sir.

Q And when you drove off to the place where you eventually encountered someone, did you have your flasher on?

A My flasher, sir?

Q Yes.

A What do you mean by my flasher?

Q Is your car equipped with a flasher?

A All cars of that year are equipped with a flasher.

Q I am talking to the red --

A No, sir, I did not. Now that you explained what you meant, I understand.

Q Sir, I --

MR. GARDNER: I object, your Honor; argumentative.

Q Sir, did your car have a flasher?

THE COURT: He means the rotating beam on top of the car.

MR. WEITZ: Judge, I don't know if it rotated or was stationary or what.

I will rephrase it.

Q Was your car equipped with lights on the top of the vehicle?

A Yes, sir, they are; of that particular car it is.

THE COURT: If you wouldn't take such a prognathous attitude and ask the questions nicely, you might get some nice answers.

MR. WEITZ: If your Honor please, once again I have to exception for the record the way --

THE COURT: It is. If you're going to put this witness in a position where he is looking for something in your question, you're never going to get any answers from him.

MR. WEITZ: He used the term flasher in his EBT.

THE COURT: He may not understand it the way you put it to him.

Q Officer, is a flasher a standard item on police vehicles?

A In my estimation, sir, a flasher is standard equipment on all vehicles on the road, sir.

THE COURT: That includes your car?

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THE WITNESS: That's right.

Q Sir, did your car -- sir, at some time in this case didn't you ask somebody to put the flasher on in your car?

A I asked someone to put on a flashing red light, yes, I did.

Q All right.

After you drove off after your conversation with these two young women, did you have your flasher on?

A No, sir, I did not. If you're referring to --

MR. WEITZ: If your Honor please, it's asking for a yes or no.

THE COURT: He says if you're referring to the lights on top of the car, the answer is no.

I am not quite sure what you mean by flasher.

Q Officer, I am referring to the flasher on the top of your car. Was it on when you drove off?

A No, sir, it was not.

Q And when you drove off, would you tell this Court and jury -- withdrawn.

When you drove off you drove off at a speed approximating that of somebody traveling on foot. Isn't that so?

A No, sir. I was traveling faster than someone on foot.

Q Much faster?

MR. GARDNER: I will object, your Honor. This is not an automobile accident case. I see no relevancy to this.

THE COURT: Mr. Gardner, it's all right.

Q In relation to somebody traveling on foot, would you say you drove off twice as fast? Just a little bit faster or much faster?

A I would say after I drove off my speed varied. I did not maintain a constant speed. I have a problem of negotiating turns. I was looking for a person or persons. I had to slow down at the corners. I had to take into account the traffic. There is no set speed that I traveled.

Q Sir, didn't you drive off slowly?

A What do you mean by slowly, sir?

Q Slowly enough for somebody to accompany you on foot. Didn't you do that?

A No, sir, I did not.

Q Page 52, line 16 of your Examination Before Trial, sir.

Sir, did you give the following answer to the

following question -- I'm sorry, page 52, line 8.

"QUESTION: And then what did you do?

"ANSWER: I then told the girls to follow me.

"QUESTION: And by that did you mean on foot or by car?

"ANSWER: I meant on foot because that's the way they were, sir."

Did you give those answers to those questions?

A Yes, sir, I did.

Q I will ask you again, sir, didn't you drive off slowly so that these two young women that you say you had the conversation with could follow you on foot?

MR. GARDNER: I will object, your Honor. It's not inconsistent with what he said.

MR. WEITZ: It's for the jury to decide, Judge.

THE COURT: No, no, no. There is nothing inconsistent with what he said thus far. But you can ask him that question. But the question and answers you read are not inconsistent with his testimony.

Q Now that I have refreshed your recollection, --

THE COURT: Don't put it that way. Leave it in the form you had it, the way you had it.

Q Would you answer the question, sir.

A Would you repeat the question, sir. I don't recall the exact wording of the question.

THE COURT: Read it back.

(The Court Reporter reads back the requested portion.)

A The answer is no, sir.

Q Did you ask them to follow you on foot?

A I asked them to follow me, sir.

Q Did you ask them to get into your car?

A No, sir, I did not.

Q Were they in a car of their own when they spoke to you? Did they get out of a car?

A No, sir, they did not.

Q Now, how many corners did you pass where you say you had to slow down to look for traffic?

A About five, sir.

Q And these corners were what, aisles?

A Aisles, sir, yes. There were not five aisles, but you asked the number of corners, sir.

THE COURT: There were two aisles and then one in which you turned?

THE WITNESS: Right, sir.

Q You were in an aisle facing east. Is that correct, sir?

A At this point, sir --

Q When you had the conversation with these two young women --

A Yes, sir.

Q -- you were facing east?

A No, sir. At that point I was facing west, sir, I'm sorry.

Q Did you tell us earlier today you were facing east?

A I said at approximately eleven o'clock I had stopped in the parking field facing east. After that stop I continued on and it was at a later time that I left the girls.

Q Didn't you tell us earlier today when you were stopped facing east you had a conversation with two young women? Didn't you tell us that?

A I don't believe I did, sir.

Q All right, Officer.

You say your car was facing west?

A Yes, sir.

Q And you proceeded westerly, however?

A To the end of the aisle, sir.

Q How far was that, sir?

A I do not know the distance, sir.

Q How long was the aisle that you were in?

A I would say better than a thousand feet.

Q And how far from the westerly end of the aisle were you when you put your car in motion to proceed west?

A I don't recall, sir.

Q As you proceeded westerly to the end of the aisle, did you look to see where these two young women were that you had this conversation with?

A As I proceeded westerly, sir?

Q Yes.

A No, sir, I didn't.

Q When you proceeded to the westerly end of this aisle, where were you in relation to the concrete apron on which the Coliseum is located?

A I was east of it, sir.

Q How far east of it?

A Again, I don't know the exact distance.

Q Well, sir, could you tell us the approximate distance?

A I would approximate it at maybe one hundred feet.

Q And would that be straight ahead of you, to the left of you, to the right of you or what?

Well, both to the right and to the left and it would be directly ahead of me, extending in both direc-

tions, sir, to the right and to the left.

Q Were you then midway between the north end of the apron and the south end of the apron approximately?

A No, I don't believe I was midway, sir.

Q Well, as you face the apron and you came to the end of the aisle, would you tell us approximately how much of the apron was north of your car and how much of the apron was south of your car?

A I would say the majority of it was south of the car, sir.

Q The majority of the apron was south?

A South of the car, sir.

Q And about how big was the apron?

A I'm sorry, north of the car. The majority of the apron would be north of the car, not south.

Q About how big is the apron?

A Again, sir, I have never measured it. I don't know.

Q Officer, were you ever assigned to the Nassau County Coliseum on traffic patrol before this night?

A Yes, sir, I was.

Q Were you ever assigned to the Nassau County Coliseum on traffic patrol subsequent to this night?

A No, sir, I never have.

Q Have you ever been to the Nassau Coliseum in addition to being assigned there as a patrolman, as a police officer?

A Prior to or subsequent to this?

Q Either prior or subsequent.

A Yes, sir, I have.

Q On many occasions have you been, both in the course of your work as a police officer as well as a private individual, have you been to the Nassau County Coliseum?

MR. GARDNER: If your Honor please, I object to this line of inquiry. It serves really no probative value. If he wants to ask him approximate or best estimate, the officer never indicated he ever measured it. If he wants to know how many cars approximately there were there --

MR. WEITZ: I would like to get an approximation, Judge.

THE COURT: I will allow it.

Q You have been there on a number of occasions, haven't you?

A To the Coliseum complex itself?

Q Yes.

A Yes, I have been to the complex on more than one occasion, sir.

Q As part of your police work when you make out reports, frequently you are required to put down your estimate of distances. Isn't that so, sir?

A Yes, sir, frequently I am.

Q So would you be good enough, Officer, to give this jury your best estimate as to the amount of the feet, the amount in feet of the apron that was to the north or to the right of your vehicle as you came to the edge of the aisle as you drove westerly toward the Colliseum on this night?

A My best estimate for this distance would be in excess of 800 feet.

Q And to the left of your vehicle, give us the best estimate of the distance to the left of the vehicle that that apron consumed.

A I would estimate 200 feet.

Q Now, at that point, Officer, in which direction did you turn?

A I turned to the right, sir.

Q And when you turned to the right, was the aisle that you had come from now to your right as you turned your vehicle?

A The aisle I had just come from would have been to my right and to the rear; yes, sir.

Q As you turned your vehicle did you look to see where these two young women were?

A No, sir, I did not.

Q Now, how far did you proceed -- withdrawn.

You would now be facing in a northerly direction. Is that correct, sir?

A That's correct.

Q And how far did you proceed in a northerly direction before changing your direction in any way?

A Three aisles, sir.

Q And when you say three aisles, that is three additional aisles to where you had been?

THE COURT: He crossed two aisles and came to a third.

Right?

THE WITNESS: That's correct, sir.

MR. WEITZ: I'm sorry, Judge. I couldn't hear you.

THE COURT: He crossed two aisles and came to a third. He passed five corners.

MR. WEITZ: That's what I am trying to find out. Is he talking about the aisle he was in or

did he cross two additional aisles and come to a third, Judge? I would like to know from the witness.

THE COURT: All right. Tell him.

THE WITNESS: I pulled into the third aisle, sir.

Q The third aisle?

A From where I was.

Q From where you had been?

A Yes.

Q As you passed the other two aisles, you had told us you stopped and looked down those two aisles.

A I never said I stopped, sir.

Q You slowed down?

A I slowed down, yes, sir.

Q All right.

Now, sir, this particular night at the Coliseum, there were a lot of people there attending this concert?

A I could only estimate from the number of cars. I was not inside the Coliseum.

Q Would you estimate for us from the number of cars.

A I would say there was a large crowd; yes, sir.

Q And in fact, Officer, it was sold out and

there were people who couldn't even get in. Isn't that true?

A This is something I have no knowledge of, sir.

Q Did you see people outside the Coliseum during the course of that evening trying to get in because they weren't able to purchase tickets?

A I saw people outside the Coliseum. Whether they were attempting to purchase tickets or not, I have no knowledge.

Q All right.

Not only did you see people outside the Coliseum, but during the course of the evening you saw people going back and forth to the parking lot, didn't you, sir?

A I did.

Q Now, as you passed the first aisle and you slowed down and you looked up the aisle, you saw people in that aisle, didn't you, sir?

A I don't recall, sir. I don't know whether I did or not.

Q Well, as you went past that aisle, didn't you look in that aisle to see if there was anybody who might have been involved in this incident that you say was reported to you?

A I looked for traffic, sir. I was directed to an area by the young women and that's where I was proceeding.

Q Did you see any people walking in that aisle?

A I don't recall whether I did or not, sir.

Q Did you look to see if there were any people in that aisle?

A No, sir. I looked for oncoming traffic, sir.

Q Is it your testimony that you expected somebody to be waiting for you three aisles over?

MR. GARDNER: That's objected to. It's Mr. Weitz's testimony. I object to the question, if your Honor please. It's argumentative.

THE COURT: I will have to sustain that.

Q Are you saying, sir, as you drove three aisles over, you made no observations with respect to the two aisles that you had to pass on your way to that aisle concerning any male individuals in the aisles?

A No, sir, I am not saying that.

Q So, Officer, is it a fact that there were male people in the aisles as you drove from the aisle that you had previously told us about three aisles over? Isn't that so?

A I previously told you, I do not recall if there

were males or not.

Q Well, in any event there came a time when you reached this third aisle, true, sir?

A True, sir.

Q As you reached that aisle you looked up the aisle?

A Yes, sir.

Q You looked in an easterly direction?

A Yes, sir.

Q And you saw a young man walking through?

A True, sir.

Q There is nothing unusual about a young man walking in a parking lot, is there, sir?

MR. GARDNER: Objection, if your Honor please. It's wholly conclusory.

THE COURT: I will allow it as far as this witness is concerned. He can answer it whether it was anything unusual, given all the facts he knew.

A No, I don't believe there was anything unusual about a man walking in a parking field, sir.

Q And as you drove your car up the aisle, you had your lights on, your driving lights?

A Are you asking me or telling me, sir?

Q Yes, I am asking you.

A Yes, I had my driving lights on.

Q And as you drove your car up the aisle with your lights on and you saw this man walking, was he walking away from you or toward you?

A Away, sir.

Q And at about how far was he from you when you first observed him walking easterly?

A I would estimate about 300 feet.

Q Okay.

And did your lights illuminate the roadway ahead of you up to that distance, the lights of your vehicle?

A My lights illuminated the roadway. I don't know whether it was the beam of the lights that reached that far or whether it was the parking lights that illuminated it.

Q But in any event, there were plenty of lights for you to see. Is that right?

A Yes.

Q And there did come a time when the lights of your car -- you could see the beams actually fall upon the man, the young lad who was walking up the aisle?

A Yes, sir.

Q And he did not run from your car, did he?

A No, sir, he did not.

Q And he wasn't acting in any way that would cause you to feel that he had committed some kind of a crime, true?

A At that point the only thing I observed was him walking, sir.

Q And that would not cause you to believe that he had committed a crime, true?

A True, sir.

Q And he was walking slowly, true? He was walking slowly, sir?

A Why do you say slowly, sir? I feel he was walking at what would be a normal pace.

Q All right.

And while you got out of your car, in the time that it took for you to travel 300 feet, then he had only walked 20 feet. Isn't that so?

A Approximately 20 to 30 feet.

Q And you stopped your car at this point, approximately 320 feet up the aisle?

A Approximately, sir, yes.

Q And you put your car in park?

A Yes, sir, I did.

Q Did you remove the ignition key?

A No, sir, I did not.

Q Are you familiar with the provisions of the Vehicle and Traffic Law with respect to removing a --

MR. GARDNER: This is not an automobile case, your Honor.

THE COURT: Sustained, sustained.

Q Well, did you at least turn off your ignition?

A No, sir, I did not.

Q Did you close your car door behind you?

A No, sir, I did not.

Q You were alone at this time, were you not?

A Yes, sir.

Q Were the young women with whom you had your conversation present with you at this time?

A Not that I was aware of, sir.

Q Well, when you got out of your car, were you able to see both to your left and right when you got out of your car?

A Yes, sir.

Q And were they in -- you told us it was a brightly lighted area. Were they within your eyesight when you got out of the car?

A No, sir, I did not see them.

Q So would it be fair to say, Officer, when you got out of the car these young ladies were not present with you?

A They were not with me, sir; no.

Q Would it be correct to say, sir, when you got out of the car you had no idea where these young ladies were?

A The exact location I would not know, sir.

Q You had no idea where they were. Isn't that true, sir?

A I had an idea, sir.

Q Did you ever see them again that night?

A No, sir.

Q Now, did you address this young man?

By addressing him, I mean did you speak to him in some way.

A When I finally caught up with him, I spoke to him.

Q No. When you got out of your car, did you speak with him, when you got out of your car?

A I called to him.

Q So that was before you caught up with him?

A Yes, sir.

Q And what did you call out?

A I called for him to stop and I identified myself

as a police officer.

Q Now, Officer, for what purpose had you called for him to stop? Were you arresting him?

A No.

MR. GARDNER: I object, if your Honor please. There are two questions there. And can we have an answer to the first part and then an answer to the second part, the first part being as to what purpose did you ask him to stop?

THE COURT: Sustained as to form.

Q Were you arresting him?

A Was I arresting him? If you term the word arrest detain, it would be an arrest. My purpose was to detain him.

Q You had no knowledge of the crime committed in your presence, sir?

A I had reasonable grounds to believe.

Q Officer, was there anything to distinguish this individual from any other person who was attending the Nassau Coliseum, any other male person attending the Nassau Coliseum that night?

A To distinguish him?

Q Yes.

A I am sure he had facial characteristics which I

did not know which would distinguish him from somebody else at the Coliseum. I am sure he had different dress from other people which would distinguish him. I am sure his build, height and weight would distinguish him from other people there.

Q When you had this conversation with these two young women, you received no information as to height, build or facial characteristics, did you, sir?

A No, sir.

Q Well now, Officer, would you tell us the exact words that you used when you stopped this man for the purpose of arresting him, as you say.

THE COURT: I don't know if that's what he said.

MR. GARDNER: He doesn't say that.

MR. WEITZ: I thought he said he was arresting him, Judge.

THE COURT: No, he did not. He said for the purpose of detaining him. And there is a distinction.

He said, if you, Mr. Weitz, define arrest to be the same as detain, I arrested him. But he said, my purpose was to detain him.

MR. WEITZ: If your Honor please --

THE COURT: My recollection doesn't control. It's the jury's recollection that controls. But that's what I heard.

MR. WEITZ: I think the Penal Law defines arrest, doesn't it, Judge?

THE COURT: I heard what the witness said, counselor. Don't put what you think something different it is.

MR. WEITZ: I am not attempting to do that.

THE COURT: Yes, you are.

MR. WEITZ: I object to that, your Honor.

THE COURT: In the light of the testimony you are.

MR. WEITZ: I didn't characterize it.

THE COURT: In the light of the testimony you are characterizing his testimony.

Now go ahead.

Q Officer, would you tell us your exact words when you got out of your car to this man.

MR. WEITZ: May I have that exhibit, your Honor?

A At this point, sir, I do not recall my exact words.

Q Would you tell us what you said to the man.

A All I can tell you, sir, is that I told him to stop.

I identified myself as a police officer and I said I wanted to speak to him.

Q Anything else?

A That is it, sir.

Q Did you put your hands on any part of his body?

A When, sir?

Q At that time.

A At that time, no, sir.

THE COURT: When he was 320 feet away?

MR. GARDNER: That's the question, Judge.

MR. WEITZ: When he told him to stop, Judge.

THE COURT: There are two points in time, as far as I understand. Your question now is talking about when he is 320 feet away. It's a little difficult to reach that far, I would think.

MR. WEITZ: Pardon, your Honor?

THE COURT: I said this set of questions is addressed to him when he was 320 feet away from the lad.

MR. WEITZ: I think your Honor is confused. I will straighten it out.

THE COURT: When did you first call for him?

THE WITNESS: When I was 20 or 30 feet away.

THE COURT: Even then it would be hard for

him to reach.

Q Officer, when you said what you have just told us this minute, what did that young man do, if anything?

A Continue walking, sir.

Q Did he run?

A I said he continued walking, sir.

Q Did you notice any change at all about what he was doing when you said that?

A No, sir.

Q Did he turn around when you said that?

A No, sir.

Q Did he change his direction, duck into -- try to run between some cars?

A No, sir.

Q He just continued walking straight ahead, true?

A True, sir.

Q What did you do then, Officer?

A I called him a second time and again identified myself.

Q Where were you when you called a second time?

A I was still at the police car standing outside.

Q Was he still walking?

A Yes, sir, he was.

Q How far was he from your vehicle at this time?

A I would assume another six or eight feet.

Q And then did you repeat that you were a police officer?

A Yes, sir, I did.

Q Tell us just what you said this second time.

A Again, I do not recall my exact words other than the fact that I told him to stop. I told him that I was a police officer. That's all.

Q Did he continue walking?

A Yes, sir, he did.

Q And what did you do while he was walking?

A At this point I left the civilian patrol car.

Q At this time before you tell us beyond that, at the point you left the patrol car, how far from the car was this man?

A A little more than 30 feet, I would estimate, sir; between 30 and 40.

Q And was he walking away from the car?

A He was, sir.

Q And were you leaving the car for the purpose of detaining this man?

A Yes, sir, I was.

Q And were you leaving the car for the purpose of arresting this man?

A Again, if you want to term the word arrest in your opinion as detaining him, I was going to arrest him. I was going to detain him in my terminology.

Q Officer, what do you say the difference between an arrest and detention is?

THE COURT: Of course, bear in mind, ladies and gentlemen, on any such question as this, you will have to take the law from me and not from Mr. Weitz or the officer or anyone else.

MR. WEITZ: I am not attempting to give them the law, Judge. I just asked the question of this gentleman as to what he understood it to be.

THE COURT: Yes. And I will allow him to give his answer. But the jury must bear in mind on any question of law such as this they will have to take it from me.

MR. WEITZ: Thank you.

Q Would you answer the question, please.

A My terminology for arrest would be the formal charging of a crime and possibly incarcerating a man for that crime, detaining him from leaving because of the charges that are to be placed against him or are placed

against him.

Q So as this individual began or continued to walk away from your automobile and you did leave your car, was it your intention to leave your car and go after him?

A That is correct, sir.

Q And did you report to anyone that you were going to detain anybody?

A No, sir, I did not.

Q Did you report to anyone that you were going to arrest anyone?

A No, sir, I did not.

Q Now, would you tell us how far -- did there come a time when you actually came up to this man physically so that you were next to him?

A Yes, sir, I did catch up to this man.

Q And how far did you proceed from your vehicle in order to come next to this young man?

A I would say approximately 60 feet.

Q And when you arrived next to him, did you come from his rear?

A Yes, sir, I did.

Q And as you proceeded this 60 foot distance, did you say anything to this young man as you were pro-

ceeding in that distance of 50 feet or 60 feet?

A No, sir.

Q Before you left your vehicle did you radio for assistance at all?

A No, sir, I did not.

Q And in fact, as far as you were concerned, as he continued to walk that 60 foot distance, you were of the opinion that he hadn't heard you. Isn't that true?

A No.

Q Officer, did you give this answer to this question on page 56 of your Examination Before Trial?

MR. GARDNER: Give me the line, please.

Q Line 20.

"QUESTION: Now, can you tell me what, if anything, you did after turning into the aisle, after making this observation of this individual 300 feet away from you?

"ANSWER: I proceeded eastbound in the aisle, stopped the car to the rear of the individual. I opened the door on the driver's side after putting the car in park. I got out of the car. I called to the individual. I told him to stop; identified myself as a police officer. The individual continued to walk. He appeared even not

to pay attention to me or not to hear me. I again called to him and told him to stop. I again identified myself as a police officer. He continued to walk and I started after him."

Did you give that answer to that question?

A I did, sir.

Q Now, Officer, did there come a time when you did draw abreast of this man?

A I approached him to the rear. I never came abreast of him, sir.

Q Now, Officer, as you approached this man, would you tell this Court and jury, how were you dressed.

A How was he dressed?

Q How were you dressed?

A I was dressed in a police uniform, sir.

Q Well, would you describe what that police uniform consisted of on this particular night?

A A uniform on that night consisted of black shoes, black socks, blue uniform trousers, a white uniform shirt, a black uniform tie, a dark blue uniform jacket and part of the uniform is a uniform cap with a cap visor attached. And I am not sure whether I had it on at that particular time.

Q Did you have any equipment or tools of your

trade, so to speak?

A Yes, sir, I did.

Q Would you describe what that consisted of?

A My equipment consisted of a belt to which is attached a holster, cartridge case, handcuffs, keys, a night stick ring.

Q Pardon?

A Night stick ring.

Q Night stick ring?

A Yes, a ring used to hold the night stick when it was worn.

My equipment, although not carried on me, also included a flashlight, a night stick in the car, a memo book, summons book, flashlight, pen, pencil.

Q Officer, the belt that you were wearing, would you tell us, was that a Safari Land Belt?

A Yes, sir, it is.

Q And that's worn around the waist --

A Excuse me, sir, in addition to the equipment I had already mentioned, I also carried a revolver which was in the holster.

Q The belt was worn around the waist, Officer, or where?

A Around the waist.

Q The holster, was that part of the Safari Land Belt?

A Yes, sir, it is.

Q And that holster, was that equipped with a strap?

A Yes, sir, it is.

Q And the gun that you were carrying, what was the gun you were carrying that night, Officer?

A The .38 special caliber Colt, trouper model, four inch barrel.

Q Now, it has a hammer, the back end of the weapon. Is that correct?

A There is a hammer, yes.

Q And when that gun is in the holster, do you keep the strap across the back of the hammer?

A At times, yes.

Q Well, that strap is there serving a dual purpose, is it not? It prevents the hammer from going back, true?

A I am not sure why the designer put it there. It might accomplish that purpose.

Q Well, doesn't it accomplish that purpose, sir?

MR. GARDNER: Objection, if your Honor please. It's argumentative.

THE COURT: I will allow him to ask that.

Does it in fact accomplish that purpose?

THE WITNESS: I beg your pardon, sir?

THE COURT: Does it in fact accomplish that purpose?

THE WITNESS: I have never tested it, sir. But I could assume it may, but for my own knowledge I do not know.

Q How long did you use that equipment? You had the gun for how many years?

A At the time of the incident, sir?

Q Yes.

A Approximately seventeen years, sir.

Q All right.

You had the Safari Land Belt and holster for how many years?

A Less than a year, sir.

Q And when you bought that, did that replace a previous holster and belt?

A Yes, sir, it did.

Q Similarly equipped?

A It was a different design, sir.

Q Did this have a leather strap -- by the way, do you have a holster here with you?

A Yes, sir, I do.

MR. WEITZ: May I call for the production of the gun holster, your Honor?

Q Do you have the gun here as well?

A Yes, sir, I do.

MR. WEITZ: May we have the gun, your Honor?

MR. GARDNER: As your Honor recalls, Mr. Weitz issued a subpoena, although outside the jurisdiction, and in the event that he called him to the stand and having to come back to get him, we produced whatever was requested pursuant to the subpoena we have. And I have no objection to it.

THE COURT: Where is it, sir?

THE WITNESS: It's at my case at the counsel table desk.

THE COURT: Do you want to step down and get it.

THE WITNESS: Yes, sir.

(Whereupon, the witness steps down from the witness stand to the counsel table and opens an attache case and the following occurred:)

THE WITNESS: Do you want both, sir?

Q Yes, sir.

MR. WEITZ: Give it to the Clerk, please.

(Handed to the Clerk.)

THE COURT: Is that gun unloaded, Sergeant?

THE WITNESS: Yes, sir, it is. I checked it.

(Revolver and holster with belt are handed to the Clerk.)

THE CLERK: One handgun and one holster belt as Plaintiff's Exhibit 27 and Plaintiff's Exhibit 28 for identification.

THE COURT: What is it, 27 and 28?

THE CLERK: The belt and handcuffs case and holster is 28 for identification. The gun is 27 for identification.

(The witness resumes the witness stand.)

THE WITNESS: There is also rounds of ammunition in the cartridge case.

MR. WEITZ: Can we have it removed, sir? I don't like ammunition in the cartridge case.

THE COURT: As long as you don't mess around and try to put a cartridge in the gun.

MR. WEITZ: I certainly won't, Judge.

Q Now, Officer, this holster has a snap, right?

A It does, sir.

Q And this snap, if you pull on it this way, it's held in place by the grommet, doesn't it, sir, a

grommet, a fastener?

A Yes, sir, there are two, sir.

Q The only way you can actually unlock this is by pulling this snap at the end?

A Yes, sir.

Q That way?

A Or at the other end, sir.

Q This way?

A There is one on the back.

Q That's the side that is worn against your body?

A That's right.

Q And there is nothing on this side to grab onto other than the grommet itself. Is that right?

A Right, sir.

Q Now, this fits around the back of the hammer and keeps the gun in place in the holster and keeps the hammer in what I would call a closed position or against the steel bar. Isn't that so, sir?

A Yes, sir.

Q All right.

Now, this is the gun that you had on on that night, true?

A True, sir.

Q Just leave them there.

The cuffs that are attached to that belt, are those the same type of handcuffs that you had on that night?

A Yes, sir.

Q And, Officer, would you tell this jury how those handcuffs work.

A How do they work?

Q Yes.

A They are hinged at the center portion and they rotate into a locking device which is built into the top of the cuff.

Q How long does it take for an experienced police officer like yourself to put cuffs on an individual?

A It depends on the amount of resistance.

Q To get it on one hand, how long does it take, Officer, if you have the hand by the wrist? How long does it take to put the handcuff on that one hand?

A A very very short time.

Q A fraction of a second?

A Well, I wouldn't say a fraction of a second, but no more than a couple of seconds.

Q And do they lock themselves, Officer, when you put them on?

A If it rotates far enough it will.

Q Now, Officer, you said that you had a night stick ring. Is that the black circle that is on that belt?

A Yes, sir.

Q And what is a night stick, Officer?

A Sir?

Q What is a night stick?

A It's a piece of equipment carried by the police officers -- most are composed of wood, some are now being made of other materials -- approximately 30 inches in length and used in police work.

Q Well, you said you had your night stick in the car.

A Yes, sir.

Q Now, is that a standard piece of police equipment, that night stick?

A Yes, sir.

Q And the particular night stick that you had in the car, that particular night stick, how long was it?

A Approximately 30 inches, sir.

Q Thirty inches in length?

A Yes, sir.

Q What was it made out of?

A Wood, sir.

Q Did it have a handle on it?

A No, sir, no particular handle; no, sir.

Q And how is that carried?

A Carried in the ring by a man on foot patrol.

Q How is it attached to the ring?

A It slides through the ring and there is a rubber stopper towards the end of the stick which rests in the ring so that it cannot slide completely through.

Q Is it equipped with a device that would go around your wrist?

MR. GARDNER: If your Honor please, I see really no probative value to this. The night stick was in the car. He wasn't on foot patrol. He didn't have it in the ring. I am reluctant to make objections, your Honor, but we are all over the field.

MR. WEITZ: I am not all over the field. I have a purpose to my question.

MR. GARDNER: It's not relevant to this case. The charges in this case is that it was a willful and intentional shooting. That's what they allege.

THE COURT: We will allow a certain amount. I don't know where he is going, but --

Q Officer, did it have a device to attach it to the wrist?

A No, sir.

Q Officer, in addition to the belt, the holster, the cartridge case, the cuffs, the rings, the night stick ring, the flashlight in the car, the night stick in the car, pencil, pen and pad, was there any other equipment that you had on that night?

A I did mention my summons book and memo book?

Q Right.

A Not that I can recall at this point, sir.

Oh, I'm sorry, I also carry a jack, a blackjack.

Q A what?

A A jack.

Q A blackjack, did you say?

A Yes, sir.

Q Would you tell the jury what a blackjack is.

A It's a small device usually covered with leather designed for the use of self-defense.

Q Where had you purchased this blackjack, Officer?

A I purchased it -- I don't recall, sir.

Q How big was this blackjack when you say a small device? How big was it in length?

A Approximately eight inches.

Q And what was the outer covering of that blackjack, sir?

A Leather, sir.

Q And what does it cover?

A What does it cover?

Q Yes. What is underneath the leather, Officer?

A The handle is spring and the end of it is, I assume, lead. I have never opened it, sir.

Q And it is a flexible device, right, sir?

A The shaft of it is, sir.

Q So as a blow is delivered with it, it picks up momentum as it strikes the object that it is to be delivered to?

A Yes, sir.

Q And it is considered by you police officers as a lethal weapon?

A Yes, sir.

MR. GARDNER: Objection, if your Honor please. It's part of the equipment.

THE COURT: Is it part of your regular equipment?

THE WITNESS: Yes, sir.

Q It is a lethal weapon, is it not, sir?

A It can be lethal, sir.

Q And was this blackjack in good condition?

A Yes, sir.

Q Does it have a handle of some sort?

A There is a leather strap attached to it.

Q Now, when you use that blackjack, the strap goes around your wrist, true?

A It can.

Q And you -- well, in using this blackjack, do you swing it by the leather thong or do you put the thong around your wrist and slip your wrist into the thong and grasp the instrument itself?

A Actually I only had one occasion to use it, sir.

Q Well, Officer, when you purchased it and you went into a store, did you hold it in your hand?

A Yes, sir.

Q Did you ascertain -- you say you bought this for a self-defense purpose?

MR. GARDNER: Objection, if your Honor please. It's not what he said. He said it could be used for self-defense, but it's part of his required equipment.

MR. WEITZ: Did he say it was part of his required equipment?

THE COURT: He said it was part of his standard equipment.

MR. WEITZ: He said required.

THE COURT: I assume required equipment is standard equipment, is it not, Officer?

THE WITNESS: Yes, sir.

THE COURT: Come on, Mr. Weitz.

MR. WEITZ: If your Honor please, I would object to your Honor saying that because it is relevant in this case.

THE COURT: Well, go ahead.

MR. WEITZ: I am not making the objection about required or standard, Judge.

THE COURT: That's just what you were arguing about a moment ago. And he had just finished answering my question that this was part of the standard equipment.

MR. WEITZ: I am only trying to find out when he asks this man about the use of it when he says he doesn't know how to use it.

THE COURT: That's not what he said. He said he used it once; he had one occasion to use it, period.

Q When you told this jury that you bought this

equipment and when you went into whatever shop you purchased it from and you handled it, did you ascertain the method whereby it is held and utilized?

A I ascertained the method by which it can be held and used.

Q And is that by putting the thong around your wrist and holding the bottom end of it?

A I would not recommend that and I would not use it in that manner.

Q How would you use it, Officer?

A I would definitely not wrap the thong around my wrist.

Q How would you use it, Officer?

A I would hold it in my hand without the thong being around my wrist, sir.

Q Isn't that loop, isn't that loop to go around your wrist so that it is not taken away from you? Isn't that the purpose of the loop, sir?

A That is the reason I would not put it around my wrist, sir.

Q Now, Officer, how big is your hand? Can you hold it out for us?

Would you say it's at least four and a half inches wide, five inches wide, your palm?

A Yes, sir.

Q Officer, when you took this young man by the arm, which arm did you use to take a hold of which arm on the boy?

A I used my left hand and I put it on his upper right arm.

Q And then did he walk with you toward your police car?

A Yes, sir, he did.

Q And as he walked to the police car with you, did he say anything to you?

A No, sir.

Q And you were -- I think you told us you were about 60 feet from the car when you apprehended him and put your hand on him.

A Approximately, yes.

THE COURT: Ladies and gentlemen, I am going to have to suspend here for a little longer than the normal morning recess because as I indicated to you yesterday, I am what is delightfully termed the miscellaneous judge. And one of the duties, which might interest you, is that I have to go down and swear in a naturalization class, a group of about 250 to 300 new immigrants to this country.

And that procedure goes on every week in this courthouse, fifty-two weeks of the year. And about that same number of new citizens are sworn in every week. It's quite an exciting affair when we think about it, that that many new people have elected to become new citizens of our country and take the oath of allegiance, and so forth, that often and that many.

And this, of course, is just one district and this happens, not to the same extent, not as many, but it happens throughout all of the other districts in the country. And I think we probably have as many, if not more new immigrants than any other district in the country.

But that takes about fifteen to twenty minutes. So you're going to have to just wait in the jury room and relax for a little bit longer than usual.

Don't discuss the case during the recess and I will be back as soon as I can.

(The jury leaves the courtroom.)

(A recess was taken.)

(The jury enters the courtroom.)

BY MR. WEITZ:

Q I think, Mr. Sehlmeyer, I was asking you about

that blackjack and how it was held when it is being used. I asked you whether you were shown the way to use it when you bought it.

A No one showed me, no, sir.

Q Were you ever in your police training shown how to use that instrument?

MR. GARDNER: I will object, if your Honor pleases. That aspect of the claim has been withdrawn, if your Honor please.

THE COURT: Sustained.

MR. WEITZ: I am not asking about that.

THE COURT: Yes.

Q Did you ever learn to -- how to use that instrument?

A Yes, sir.

Q Did you learn how to use that instrument?

A Yes, sir.

Q Would you tell us how was that instrument to be used?

A It is to be used -- to be held in the hand and --

Q What part is to be held in the hand, sir?

A The shaft part of it.

Q Did you say the shaft?

A Yes, the long narrow extension.

Q In the palm of the hand?

A Yes, sir.

Q And what is the thong to be used for?

A As I said, I was never given any particular instruction as to the proper or required use of it. I myself had only one occasion to use it and at that time, as you asked, I did not put it around my wrist.

Q Is your answer, sir, that you don't know what the use, what the thong is for?

A No. My answer is, as far as I know there is no specific instructions as to what the thong is for.

Q Do you know what the thong on a blackjack is for?

MR. GARDNER: Objection, if your Honor please. Judge, I am really reluctant to keep interrupting --

MR. WEITZ: I don't think you're reluctant at all.

MR. GARDNER: The claim in this case is very simple in the pleadings. They are alleging not that he didn't use the blackjack properly --

THE COURT: Do you object?

MR. GARDNER: Yes, your Honor.

THE COURT: Objection sustained.

Q Officer --

THE COURT: Go on to something else.

Q Well, Officer --

THE COURT: Go on to something else.

MR. WEITZ: Judge, all I said was, "Oh, Officer." I was going to ask another question. Would you please give me that courtesy, your Honor?

Q Officer, you started to walk back to the car with this young man?

A Yes, sir.

Q And there came a time when you approached this automobile and drew near to it?

A Yes, sir.

Q And you had your left arm on his right arm, correct, sir?

A No, sir.

Q Did you have your left hand on his right arm?

A Yes, sir.

Q And would you tell us, were you holding him tightly?

A I was holding him tightly enough to maintain the contact between him and I.

Q Were you holding him tightly enough to maintain the direction in which you were walking?

A Yes, sir.

Q And then suddenly he spun around?

A Yes, sir.

Q How big was this man?

A Five foot nine, sir.

Q And how much did he weigh?

A Approximately 160 pounds.

Q And as he spun, this tight grip that you had on him, you lost that grip, true?

A I lost my grip on him, yes, sir.

Q And he shouted something, true?

A He started shouting, yes, sir.

Q You couldn't understand what he was shouting, could you?

A Not at all, sir.

Q Would you say at this point this young man whom you had previously had by the arm was irrational?

A I don't know whether I would say he was irrational. He was extremely violent.

Q [illegible]e incoherent?

A As far as I was concerned, yes, sir.

Q And in which direction did he spin when he spun away from you?

A I don't know, sir.

Q But, in any event --

MR. GARDNER: If your Honor please, can we have the door closed? I am getting the echo.

THE COURT: Did he spin away from you or did he spin towards you?

THE WITNESS: I believe he spun around towards me, sir.

Q Where did you have your right hand at that time?

A On the right side of my body.

Q As he spun was it up or down or around? Were you holding anything in the right hand?

A I wasn't holding anything, no, sir.

Q Did you move your right hand upward?

A I assume it came up in a gesture of self-defense, yes.

Q And did you deliver any blow with your right hand?

A Not at that time, sir.

Q Did you slip to the ground?

A I either slipped or was knocked down or a combination thereof.

Q Did you back up and slip?

A I was slipping, yes, sir.

Q And did you fall to the ground?

A Yes, sir, I did.

Q When you brought your right hand up as the individual spun around, did you grab hold of him with your right hand?

A I don't believe so.

Q Did you grab hold of him with your left hand?

A I had just lost contact with him with my left hand.

Q Did you try to regain your grip on this individual?

A No, sir, I don't believe so. I believe I tried to break my fall.

Q Well, as you fell to the ground, did this individual come down on top of you?

A Yes, sir, he did.

Q Now, as far as you knew, he had no weapon, true?

A As far as I knew he was unarmed, yes.

Q And he was wearing a T-shirt?

A Yes, sir, he was.

Q A pair of slacks?

A Yes, sir.

Q As you approached him to detain him, you noticed no suspicious bulges about any part of his clothing or attire, true?

A I noticed no suspicious bulges, no.

Q There was nothing about his appearance that caused you to search him when you stopped him?

A No, sir.

Q And you had no reason to believe or suspect at this point he was carrying any weapon of any sort, true?

A True, sir.

Q And now as you were both on the ground, would you say he was still in this incoherent irrational state?

A Yes, sir.

Q And you did start to arise or get up, did you not? You did attempt to get up, did you not?

A At one point I did, yes, sir.

Q All right.

As you started to get up you were actually above him, weren't you?

A I was in front of him, sir.

Q And higher than he was?

A Because of my height I would assume I was higher than he was, yes.

Q And while he was beneath you, you reached into your back pocket and withdrew your blackjack, did you not?

A I don't believe he was beneath me.

Q Did you reach into your back pocket and withdraw your blackjack?

A Yes, sir, I did.

Q And did you deliver a blow with this instrument that you previously told us was a lethal instrument? Did you deliver a blow to that boy's head, to this boy's head with that instrument?

A Yes, sir, I did.

Q And he was below you when you delivered that blow? You hit down on him, didn't you, sir?

A No, sir. I believe he was at the side, sir.

Q Did he reach up at the blackjack when you hit him?

A After I hit him, sir.

Q He reached up, did he not?

A He reached up, yes. His hand was over the blackjack.

Q You told us that you had your blackjack in your hand. Your hand is about four and a half, five inches and that the blackjack was eight inches, sir. True?

A Yes, sir.

Q When this boy's hand reached up towards the

blackjack, did you withdraw the blackjack or did you start to hit him again with it?

A I did not hit him again with it, no, sir.

Q Did you withdraw it from his reach?

A No, I did not withdraw it from his reach.

Q What were you doing with your left hand as you struck this boy with your right hand holding the blackjack?

A I do now know where my left hand was, sir.

Q In any event, Officer, you said you were not holding the thong when you delivered this blow, you were holding the instrument itself in your hand, true?

A True, sir.

Q And you say somehow you ended up with the thong in your hand and the boy ended up with the blackjack in his?

A That's right, sir.

Q And then you say you don't know exactly what happened, but somehow or another the boy was then behind you with his arms around you, true?

MR. GARDNER: If your Honor please, I object to the form of the question, and then you say. He didn't ask him, really. He only asked this witness what he was doing.

MR. WEITZ: Your Honor, Mr. Gardner read four pages of what this man claimed happened, Judge.

THE COURT: Why do you ask him what happened rather than you trying to get your bits and pieces of what happened without giving a full picture here?

MR. WEITZ: Judge, I think I would prefer to ask the questions in my order based upon what has already been read by Mr. Gardner.

THE COURT: But you left out the pieces of what Mr. Gardner read.

MR. WEITZ: No. Mr. Gardner read the entire story. I am sure the jury remembers his version of the accident. And I am questioning about those events he --

THE COURT: You're taking an event here and an event here.

MR. WEITZ: Is your Honor saying my questions are unfair?

THE COURT: That's what his objection is.

MR. WEITZ: If that's what your Honor is saying, that I am not being fair to this professional witness, I would like for you to say it on the record.

MR. GARDNER: I object to this man being a professional witness.

THE COURT: I don't think he is a professional witness. He is a professional in the sense that he is a policeman, and that's all.

Q Ever testify before, Officer?

A Yes, sir.

THE COURT: That doesn't make him a professional witness.

Q Testify many times in a court, Officer?

THE COURT: That doesn't make him a professional witness.

Q Officer, did there come a time when this young man had his arms around your chest?

A Yes, sir.

Q And you were both in a kneeling position on the ground, true?

A True, sir.

Q But as he had his arms around your chest, your arms were not pinned, true?

A True, sir.

Q And at this time he was no longer saying anything, correct?

A During this time he was battling.

Q Battling?

A Screaming, rambling.

Q And holding on to you, right, sir?

A Yes, sir.

Q And while he was holding on to you and babbling, another automobile came up the aisle toward where you were. Am I right?

A Yes, sir.

Q And that car stopped, right?

A Correct, sir.

Q And a young lady got out of that car, correct?

A Yes, sir.

Q And you were able to converse with this young lady, true?

A I made requests of her, yes, sir.

Q You spoke with her, did you not?

A I did, sir.

Q She spoke with you, did she not?

A She did, sir.

Q And would you tell us what she said to you and what you said to her.

A I asked her if she would go to my police car and use the radio and call for assistance.

She told me she didn't know how to use the radio.

I told her to go to the car. I explained to her where the microphone was. I told her there was a button and to depress the button and to request a signal fourteen at my location.

She went to the car and apparently she attempted to comply with my request. Apparently they -- the CB or Communications Bureau had a problem understanding her. And she called out to me that they wanted a better location.

Q Now, Officer, all during this time you and George Haber -- and you didn't know his name at that time, did you, Officer?

A No, sir, I did not.

Q You remained in that same position?

A Relatively, yes, sir.

Q He wasn't striking you or beating you in any way, was he, sir?

A At this point he had calmed down, sir.

Q Was he still babbling?

A I don't recall if he was trying to say anything or not.

Q And, Officer, you were remaining still, true? You weren't moving around?

A No, I was trying to remain as still as possible.

Q And while you remained still and he remained still, you were able to communicate with this girl and give her instructions, true?

A True, sir.

Q Now, you say there came a time when apparently somebody had asked her for a better location. And did you continue your conversation and instructions with this girl?

A Yes, sir.

Q Now, would you tell this jury what you said to her and what you told her to do and what she said to you.

A I told her to tell them the east side of the Coliseum in the parking area. And I asked her to turn on the flashing dome light on the police car.

She said she didn't know how to turn it on.

I told her to --

Q Did you instruct her how to turn it on?

A Yes, sir, I did. I told her there was a button to the left of the steering wheel, it was a different type button that the car is normally equipped with. And I told her just to pull it out.

And she then stated that she couldn't find the button.

Q Now, Officer, you had previously instructed her on how the microphone was to work, did you not?

A Yes, sir.

Q All right.

And did you then instruct her that it was a white switch and that it was different than the other switches and that is the switch to turn on the dome light? Did you tell her that?

A Yes, sir, I did.

Q And you had no problem in giving her those instructions, did you, sir?

A Well, the only problem I had was trying to be as calm as possible so I did not aggravate the subject and to convey the message to her as clearly as possible so that she would be able to understand.

Q Now, when you say -- did you say aggravate the subject? Is that the term you used?

A Agitate.

Q Agitate?

A Yes. Every time I moved it seemed to set him off again. He would start to tense and tighten his grip.

Q So as long as you were quiet he was quiet, right?

A Relatively, yes.

Q And a signal fourteen had in fact been transmitted, true?

A I don't know that, sir. I had requested it be done.

Q Well, when the girl asked you and told you that someone wanted a better location, you knew at that point a signal fourteen had been transmitted, hadn't you, sir?

A No, because she also said they were having trouble understanding her.

Q Well, Officer, the radio that you have in your car, you can hear it even when you're away from your car. Isn't that so?

A Depending on the distance you are from the car and if the outside speaker is turned on.

Q Well, when you left the car on this occasion to go those sixty feet away from your automobile to apprehend this young man, to detain him, did you have your radio on?

A Yes, sir, it was.

Q And didn't you hear the conversation between the CB and the girl while you were at the side of the car or near the car with this young man in the position that you previously told us?

A I did not hear the conversation of the young lady; no, sir, I did not.

Q Did you hear the comeback of the -- from the CB when they asked for a better location?

A If I heard it, I do not recollect now, sir. I don't believe I heard it.

Q Well, Officer, the request for a better location was for the location of your vehicle, true?

A I assume so, yes, sir.

Q And that request came after you had instructed this girl to transmit a signal fourteen, true?

A True, sir.

Q And it came after you had instructed her in the use of the microphone and where the button was on the microphone, correct?

A Correct, sir.

Q So you had no reason to believe at that point when a request came for a better location that the signal fourteen had not been transmitted. Isn't that so?

A That's not so.

Q All right.

Now, Officer, did there come a time when you arose to your feet?

A Yes, sir, there did.

Q Now, where was the young lady at the time you got up to your feet?

A She was leaving the police car, sir.

Q Which door had she entered the police car from?

A The front door on the left side, sir.

Q The driver's side?

A Yes, sir.

Q And then she walked out through the same door or another door?

A I don't think she walked out through the door, sir. She exited the same door that she had entered in.

Q When you got up to your feet had the dome light already been put on, the flasher?

A No, sir.

Q When you got up to your feet, had you instructed the girl to put on the flasher?

A Yes, sir, I had.

Q And when you arose to your feet and before the flasher was put on, was the young man still hugging you around the chest?

A As we got up he was still hugging me around the chest, yes.

Q And he was docile at this point, was he not?

A At this point he was docile, yes, sir.

THE COURT: That bothers me. Did the girl ever turn the flasher on?

THE WITNESS: No. She was unable to find the switch.

THE COURT: But the way you worded it, it led me to believe that it was ultimately turned on.

THE WITNESS: No, sir.

Q Officer, as you arose this young man was in a docile state. At that time the flasher was not on?

A No, sir.

Q Were you still giving instructions to the girl as to what she was to do?

A No, sir.

Q All right.

And as you arose, did she get out of the vehicle?

A Yes, sir.

Q All right.

Now, you didn't tell her at this point to continue transmitting a signal fourteen, did you, sir?

A No, sir.

Q So as far as you were concerned at the time that this young man was in a docile state and you arose

to your feet and at the time this girl exited from the vehicle, a signal fourteen had been transmitted. Isn't that true?

MR. GARDNER: Objection, your Honor. Asked and answered. He said he didn't know whether it was or not.

THE COURT: He answered the question, I don't know how many times, that he didn't know.

Q Sir, did you ask her to attempt another transmission of a signal fourteen?

A No, sir.

Q Was there anything to prevent you from waiting for assistance at this point?

MR. GARDNER: Objected to, if your Honor please. He didn't know if it was coming or not.

THE COURT: I will sustain the objection.

MR. WEITZ: On that ground, Judge?

THE COURT: On the ground -- yes, on the ground that it's an improper question. It assumes that assistance was coming.

Q Did you have any reason to believe that assistance was not on the way?

THE COURT: There was no reason for him to believe that assistance was on the way.

MR. WEITZ: Is your Honor testifying for this witness?

THE COURT: That's the objection that was made.

MR. WEITZ: Your Honor is then making a judgment that this jury has to make.

THE COURT: I am not making a judgment. I am not letting you make an assumption that there was, in view of this witness' testimony that he didn't know there was a signal fourteen.

MR. WEITZ: He claims he didn't know.

THE COURT: He testified under oath that he didn't know.

You have not produced any contrary testimony. That's all the evidence there is. And you cannot assume on that basis that assistance is coming. That is why I sustained the objection.

MR. WEITZ: If your Honor pleases, I think we have in the evidence the CB transmission, don't we?

THE COURT: Yes, there is. But you're talking about this witness' mental state of mind, counselor. You are not talking about what happened elsewhere in Mineola.

MR. WEITZ: Didn't he also tell us, Judge, his

radio was on and he could hear --

THE COURT: He said he did not hear. Don't you testify. It's the jury's recollection.

Q Officer --

THE COURT: Wait a minute.

MR. WEITZ: I will ask the question.

THE COURT: Wait a minute.

It's the jury's recollection that would control what the prior testimony was. But do not assume facts in your questions or I will straighten it out every time that you do.

MR. WEITZ: Surely, Judge.

Q Officer, when you got up the man was still docile, true?

A True, sir.

Q The girl had attempted, as far as you were concerned, to transmit a signal fourteen, true?

A True, sir.

Q The girl had attempted unsuccessfully to put on the flashers as far as your recollection was concerned, true?

A True.

Q And the girl had performed as best as she could, everything you had instructed her to do, true?

A I would say that's true, sir; yes, sir.

Q You did not ask her, Officer, to continue to transmit a signal fourteen, did you?

A No, sir.

Q Was that because you believed, Officer, that the signal fourteen had been successfully transmitted when you heard -- when you were asked by the girl for a better location?

A No, sir.

Q Didn't the girl say to you they want a better location?

A Yes, sir.

Q And didn't you understand that to mean that she was -- that she had transmitted this signal fourteen and they were asking for a better location?

A No, sir.

THE COURT: The objection is still sustained as to --

MR. WEITZ: I am not finished, Judge. There is no objection now.

THE COURT: Well, you have not sustained your burden on that question.

MR. WEITZ: Judge --

THE COURT: Go ahead.

MR. WEITZ: If I pause, it's for a moment to reflect on the answer. I don't really think it's necessary for the Court to interject remarks at this time.

THE COURT: I am not --

MR. WEITZ: I don't want to engage in colloquy with the Court.

THE COURT: You are going to as long as you pursue this kind of tactic.

Q Well, Officer, what did you think they meant when they asked for a better location?

A I thought it was possible that if they had a problem understanding her transmission or her request, they were attempting to find the location to send another car to ascertain what her request is or what the request of the person transmitting was.

Q Officer, did you then walk to the police car?

A We walked towards the police car, yes, sir.

Q Before you walked to the police car, did you swing around and put a hammer lock on this individual?

MR. GARDNER: If your Honor please, at this stage I will object. Counsel has been going in piece by piece as if this was a film clip done one frame at a time. He has not mentioned anywhere --

THE COURT: The jury is fully aware of this and I don't think we have to point it out again. And you will be given a full opportunity on cross-examination to bring out the full story.

MR. GARDNER: If your Honor please, he is not indicating what the other individual is doing during this time.

THE COURT: That's perfectly all right. You will be able to clarify it.

Q Well, Officer, did you ever say --

THE COURT: Wait a minute. There is no inconsistent testimony.

MR. WEITZ: Your Honor is indicating I left something out and I have not. And if your Honor wants me to show him at the side bar I have been following word by word, line by line --

THE COURT: I have been watching what you have been doing, the same as Mr. Gardner has been watching what you're doing.

Q Did you --

THE COURT: Don't read from something in the evidence. Ask a question.

Q Did you swing around and put a hammer lock on this man?

A Yes, sir.

Q And did you do that right after you got up quietly and docilely with the man?

A Yes, sir.

Q Now, would you tell this jury when you swung around and put a hammer lock on him, would you describe your motions as to exactly what you did.

A My motions, sir?

Q Yes.

A As I got to my feet and the subject was behind me with his arms around my waist and chest area, I had my hands on top of his wrists. As I got up I was able to pry his hand off of my chest. I swung around and brought his arm around with me into a hammer lock in back of him.

Q You say you brought his -- was it one arm or two arms?

A One arm.

Q Which arm?

A I believe I swung to my right, but I am not even sure, sir.

Q Holding on to which one of this man's arms, sir?

A If I swung to my right, it would have to be his right also and it would have to be his right arm.

Q So you were holding his right arm by the wrist, do you say?

MR. GARDNER: I object, if your Honor please. The witness said he clearly doesn't recall if it was that he swung to the right or left. And if it was right, it would have been his right arm. And I don't think it's fair for counsel to establish for a fact since he says he doesn't recall exactly.

Q Is this your best recollection, Officer?

A Yes, it is.

Q And are you right-handed?

A I am, sir.

Q And now would you describe for us the position you were in when you say you had what you call a hammer lock on this man.

A When I had the hammer lock on him I was standing to his rear and his arm was bent and behind his back.

Q You say his arm was bent. Were you holding it in a bent position?

A Yes, sir, I was.

Q Were you applying pressure in any direction?

A I was applying pressure to hold it in the rear of the gentleman, yes.

Q And were you pushing upwards as you held his

wrist to the rear?

A I was applying pressure upwards, yes, sir.

Q And what were you doing with your left arm?

A I don't recall, sir.

Q Well, did he remain in a standing position with his arm -- is this what you mean when you say a hammer lock (indicating)?

A Yes, sir.

Q The position I have my hand in (indicating)?

A Yes.

Q And you were holding him around the wrist?

A Yes, sir.

Q Did you have any part of your left arm against any part of his body?

A I couldn't say for sure, but in a position like that it would normally be on his left shoulder.

Q Well now, this way or around the neck (indicating)?

A No, on his left shoulder.

Q And what would you be doing? Would you be pushing forward or pulling toward you?

A I would be directing him in the direction I wanted to go or I wanted to move the subject.

Q Now, when you put this hammer lock on the man,

up until that instant when you spun around and grabbed him and pulled his right arm up and applied pressure in a direction, up to then he was docile?

MR. GARDNER: Objection, if your Honor please. Does he mean when they got up from the ground?

MR. WEITZ: From the time he got up from the ground.

THE COURT: I will sustain the objection as to form.

You don't have to have a short summation on every question.

MR. WEITZ: I will proceed then, Judge.

Q At the time that you were pressing upward and you had your left arm -- left hand on his left shoulder, at that time what, if anything, was he doing?

A He was starting to walk towards the police car.

Q In the direction in which you were moving?

A Right, sir.

Q And he offered you no resistance?

MR. GARDNER: At what point?

MR. WEITZ: At that point.

A Again, it would be only an estimate. I don't know the measurements; ten, twelve feet.

THE COURT: The question is: At that point

when you were guiding him towards the car, was he offering any resistance?

THE WITNESS: Oh, no, sir.

Q When you were on the ground before you got up, did he attempt to let go of you and run away?

A No, sir, he did not.

Q Now, as you walked those ten or twelve feet toward the car, did you have in mind at that point your previous observations as to this man's ups and downs and irrationality? Did you bear that in mind as you walked towards the car?

A Yes, sir.

Q And did you endeavor to keep a tight grip on this young boy?

A Yes, sir.

Q And then did you get -- did you ever attempt to cuff him and restrain his hands?

A Did I ever attempt to?

Q Yes.

A No, sir.

Q As you got to the vehicle, did you bring the individual all the way over to the vehicle?

A No, sir. We never reached the vehicle.

Q For what purpose were you bringing the indi-

vidual, this young man, to the vehicle?

A I had intended to handcuff him when we got to the vehicle.

Q When he had his arms around you and you had your arms free, you were able to separate his arms, you told us before, true?

A When we got up, yes, sir.

Q And he was docile at that point, true?

A When we were getting up he was docile, yes.

Q Where were your cuffs kept, Officer?

A On the loop on the gun belt.

Q Would you hold that up for us and tell us if that's where it is carried now.

A This is the front of the belt and this is the holster (indicating). And they are carried to the rear and slightly to the right, in this fashion (indicating).

Q Now, Officer, did you keep in mind that possibly as you walked towards the car, that this yound man would again start to babble, scream and try to get away from you or pull away from you or do something of that nature?

A I am sure the thought went through my mind, yes.

Q And you were alert for that, were you not, sir?

A Yes, sir.

Q When you got -- as you got close to the car, did you let go of him?

A I didn't let go of him. He broke loose, sir.

Q Well, you had him from behind, did you not, Officer?

A I did, sir.

Q And you had his right hand -- you were pushing up?

A Yes.

Q And you had him by the left shoulder?

A Yes.

Q And would you describe for us how he managed, this five foot nine boy, managed to break loose from your grasp?

A He spun around and I was just unable to hold him.

Q When you say he spun around, in which direction did he spin?

A He spun to the right, sir.

Q To the right?

A Yes, sir.

Q Didn't you apply pressure on that right arm you were holding behind his back by the wrist when he spun to the right?

A I most certainly did.

Q When you say he spun to the right, Officer, do you mean this way, the way I have turned --

MR. GARDNER: I object, your Honor. Counsel is turning to the left.

Q -- or do you --

THE COURT: Wait a minute. The least you can do when you stand in front of the jury, you could have spun the right way.

MR. WEITZ: I gave him both directions, Judge.

THE COURT: No, you didn't.

MR. WEITZ: I gave him both directions, Judge.

THE COURT: No, you didn't.

MR. WEITZ: The jury can say whether I gave them both directions, Judge.

THE COURT: Ladies and gentlemen, we will take a five minute recess. I want to have words with counsel.

Don't discuss the case.

(The jury leaves the courtroom and the following takes place out of the presence of the jury:)

THE COURT: Counsel, your conduct is insolent. Your words are contemptuous. And if you do it again, I will start keeping score on you and I will tally

it up at the end of the case. And don't do it again or I am warning you there will be no recourse except to the Court of Appeals.

MR. WEITZ: May I have a request, Judge?

I would respectfully request to your Honor to have the question I read to the officer read back. And if I had not indicated two spins --

THE COURT: I heard and I saw what you did and that's not what I am saying. It's your insolent tone and your insolent sneering at the Court and your insolent language to the Court. And I will not have any more of it.

MR. WEITZ: If I have been insolent, if your Honor please, I apologize to the Court.

THE COURT: Your apology is accepted and I tell you right now I will not tolerate any more of it. And I am warning you, and this is the last warning you will get.

MR. WEITZ: And your Honor will have no problem with me.

Before the jury comes back, I would respectfully ask the Court to see whether or not in my question to this witness --

THE COURT: I have heard and I understood

what you said and I understand what you're saying. You will not carry out any such demonstration. You will stand there and ask questions and you will not carry on those questions in the tone you have been carrying them out in.

Bring the jury back.

MR. GARDNER: I would like the record to reflect that I rose in objection to that question precisely because and in demonstrating to Mr. Weitz' move to the left and rather than to the right.

THE COURT: Bring the jury back.

(The jury enters the courtroom and the following takes place in open court and in the presence of the jury:)

MR. WEITZ: May I ask the witness to demonstrate the direction of the turn, Judge?

THE COURT: No. The direction of the turn is perfectly clear. He said he spun to the right.

Q At this point, just before he spun to the right, you were both facing in the same direction, correct?

A Correct, sir.

Q And to the right would be both to his right and to your right?

A That is correct, sir.

Q Well, as he turned or spun to the right, what did you do?

A I lost my grip on him, sir.

Q Weren't you holding him by the wrist?

A Yes, sir, I was.

Q Weren't you applying pressure upwards?

A Yes, sir.

MR. GARDNER: We have been through this, your Honor.

THE COURT: We have been through this twice, but this is his style.

Q As he came around -- as he spun to the right, did he end up facing you, Officer?

A For a moment, yes, sir.

Q What did you do?

A I made an attempt to grab him again.

Q Will you describe that attempt.

A I reached out with both hands in his direction.

Q How far was he from you?

A Within inches.

Q Did you lay your hand upon him?

A Yes, sir.

Q On what part of his body did you place your

hand?

A Some part of the upper extremities. I am not sure whether it was his shoulder or his T-shirt or somewhere in the chest area.

Q And what did you do thereafter?

A I was unable to grab hold before he started for the police car.

Q Well, when you grabbed him by the shoulders, he had his back to the police car, did he not?

A When I grabbed him by the shoulders? I never did grab him by the shoulders. I attempted to, but I was unable to hold him.

Q And he had his back to the police car, didn't he?

A Yes, sir.

Q So from the time you tried to grab him by the shoulders until the time he started for the police car, he had to turn around again?

A Yes, sir.

Q Did you try to grab him at that point?

A As he spun around I was knocked off balance by the motion of the twisting and I was off balance and I was unable to hold him.

Q Which turn knocked you off balance, Officer?

A His swing to the right, sir.

Q Well, Officer, did he get into the car eventually?

A Yes, sir, he did.

Q Where were you when he got into the car?

A Following him, sir.

Q Were you on your feet again? Had you gottn up to your feet again?

A I never lost my footing, sir. I didn't fall to the ground.

Q Well, were you on your feet when he got to the car, Officer?

A Yes, sir.

Q And how long -- how far away from you was he when he got into the car, Officer?

A A foot or less.

Q And what were you doing while he was getting into the car, Officer?

A Trying to take physical charge of him again.

Q Would you describe physically what you were doing?

A I was reaching for him, attempting to get a hold of him, attempting to prevent him from escaping from me.

Q You say escaping from you. Do you mean enter-

ing the automobile?

A Yes, sir.

Q Well, did you grab hold of him?

A Did I? At what time, sir?

Q As he was entering the automobile.

A No, sir.

Q Did he sit himself behind the wheel?

A Yes, sir, he did.

Q And were you still a foot away from him when he sat himself behind the wheel?

A No, sir. I was right in back of him, sir.

Q Pardon me?

A No, I was right in close proximity to him, sir.

Q Less than a foot away?

A Yes, sir.

Q Did you grab him as he sat behind the wheel?

A No, sir, I did not.

Q Did you attempt to cuff him as he sat behind the wheel?

A No, sir, I did not.

Q I show you Plaintiff's Exhibit 11-D in Evidence, Officer.

(Handed to the witness.)

Q Is this a fair and accurate picture of the

front seat of your car, the car that was involved in the shooting on that night?

MR. GARDNER: Objection to the form of the question as to shooting, your Honor.

I have no objection to anything as far as the incident is concerned or weapon being discharged.

MR. WEITZ: On this event, this night.

A Yes, sir, this is a picture of the front seat of the car, sir.

Q And is that a picture of the position it was in when you drove it that night, the front seat?

A I would say to the best of my recollection, yes, sir.

Q And was this car equipped with any special tilt steering wheel?

A No, sir.

Q So would that be a fair and accurate description of the position of the steering wheel in the car that you were operating on that night, the position it was in?

A Yes, sir.

Q And when this young man got into this car, did he put his hand on the steering wheel?

A Yes, sir.

MR. WEITZ: May I have the jury take a look at this picture while I question the witness, Judge?

THE COURT: Yes.

MR. WEITZ: Pardon me?

THE COURT: Yes.

MR. WEITZ: May I hand it to them?

THE COURT: Just hand it to the foreman.

MR. WEITZ: Thank you, Judge.

(Photograph referred to is handed to the jury.)

THE COURT: Go ahead with your question.

(The jury views the photograph and the following occurred:)

Q Did he put both hands on the steering wheel?

A I believe he did, sir.

Q And to do that the hands are in front of the individual, true?

A True, sir.

Q Did you put your cuffs on him while he had his hands on the steering wheel?

A No, sir.

Q Did you attempt to pull him out of the car?

A At that point, sir?

Q Yes.

A No, sir.

MR. GARDNER: The alternates have not seen it.

MR. WEITZ: Yes, thank you.

May I hand it up, Judge?

THE COURT: Yes.

(Photograph referred to are handed to the alternate jurors.)

Q What did you do, Officer?

A I reached in, in an attempt to shut the engine of the car off and remove the keys because the subject had begun to rev the engine up, I would say, to its full extent. And if he had thought to put it in gear, he may likely have killed someone.

Q Officer, was there a console between the two seats?

A Yes, sir.

Q Was the key located on the right-hand side of the steering post?

A Yes, sir.

Q When you say you attempted to reach in to get that key out, you're right-handed. Did you do that with your right hand?

A No, sir; my left hand, sir.

Q Are you saying to this jury that you reached across the front of this -- were you inside or outside

the car when you tried to pull those keys out, as you claim?

A Outside the car, sir.

Q Was your entire body outside the car?

A No, sir.

Q What part of your body was in the car?

A My left arm was inside the car, my left hand. I had to put the upper part of my body in the car in order to reach that far, sir.

Q As you tried to reach in, how far did you have to reach to get to where the steering -- withdrawn.

How wide was this front seat you sat on as shown in this picture, Officer?

MR. GARDNER: I object, if your Honor please. The witness hasn't indicated he was seated in the front seat of the car.

Q When you drove the automobile, did you --

THE COURT: It didn't change from one moment to the next, when you ask him how wide the front seat was. I will allow it.

Q How wide is the front seat?

A Standard width of an auto seat.

Q How wide would that be?

A I don't know the length, sir. Your estimate is

as good as mine.

Q Would you say it would be two and a half feet?

A I would say it's in excess of two and a half feet.

Q All right.

So, Officer, you had to reach past this young man who was seated behind the wheel and past the steering column and around to get the key. Isn't that so, sir?

A I reached on top, sir; not around.

Q You had to reach over to do that, didn't you, sir?

A Yes, sir, I did.

Q So that you were back from this young man as he was seated there, true?

MR. GARDNER: I object to the form.

MR. WEITZ: Withdrawn.

Q Were you reaching across this man's body?

A His legs were extended past the front of the seat, yes.

Q But you weren't reaching across the seat part of the car, you were reaching over the steering wheel part of the car. Isn't that so, sir?

A I might have been reaching over the corner of the seat. I couldn't say exactly. I was not looking at

the seat.

Q Well, Officer, you were careful that you reached in to get these keys to be facing this young man. Isn't that so?

A That is right, sir.

Q So that as you reached in you reached in at a point away from where this young man had his hands. Isn't that so?

A I don't understand your question, I'm sorry, sir.

Q Well, he had his hand on the steering wheel, Officer, true?

A At one time, yes.

Q And the keys are on the steering column, true?

A True, sir.

Q Would you hold up your hand and show us how long your arm is, Officer. Would you hold it straight up in the air.

(The witness complies.)

Q How long is your arm, sir, from fingertip to shoulder?

A Thirty-eight, thirty-nine inches. I wear a thirty-eight inch sleeve on my shirt.

Q So a total of thirty-eight to thirty-nine, would you say?

A I would say that's a good estimate, yes, sir.

Q And was your right hand at your right side when you were attempting this maneuver you just described for us of reaching in and pulling out the keys?

A I believe it might have been on the subject, but I don't know at this particular point while I was reaching, it could very well have been on the subject.

Q You don't know where the -- where your hand was?

A At that particular time I was reaching, no, I couldn't say that.

Q Were you looking at the subject or looking for the keys or what?

A I was looking at the subject.

Q And as you looked at the subject, did you observe where his hands were?

A His hands were flashing around, sir.

Q So that he was no longer attempting to steer the car?

MR. GARDNER: I will object, if your Honor please. We know at one point he had his hands on the steering wheel. We don't know what he was attempting to do.

THE COURT: So his hands were no longer on the

steering wheel?

Q True?

A That's correct.

Q And, Officer, may I see this for a minute.

Is there a gear shift mechanism on this car?

A There is a -- yes, there is a gear shift.

Q Where is that gear shift on that picture, sir?

A On the photo, sir?

Q Yes.

A It looks like it may be hidden by the center post of the steering wheel.

Q It can't be seen on that photograph?

A I can't discern it myself, no, sir. It could be behind the center post of the steering wheel.

Q Officer, as you saw his hand flashing about, were you still reaching for the keys?

A While I was reaching for the keys I saw his hand flashing about, yes.

Q Did you get your hand on the keys?

A No, sir. I never did get my hand on the keys.

Q Did you take your left hand and put it some place other than on the steering wheel, the steering column?

A Yes, sir.

Q Where did you put it?

A On the subject.

Q And on what part of George Haber did you put your left hand?

A My hands at some time were all over the upper extremities of his body, from his head down.

Q Officer, did there come a time that you claim you felt this young man's right hand reach some part of you?

A I felt his right hand and left hand approach me at many times, yes.

Q Did there come a time when you claim you felt his right hand approach some portion of your body where you had a weapon?

A No, sir, I don't believe I have stated that.

Q Well, did there come a time, Officer, that you withdrew your gun from your holster?

A No, sir.

Q Did there come a time, Officer, when you had your gun in your right hand and this young man was in the automobile?

A Yes, sir.

MR. GARDNER: If your Honor please, my objection to this line of -- I understand your Honor's

ruling that I get my chance, but I think it's grossly unfair to the witness on the stand to spurt out his actions and to leave the jury totally void of what was happening to the other individual. I will abide by your Honor's ruling, but I think it's --

THE COURT: The jury is sophisticated to know what the facts are here. They heard this Officer's complete version at one point.

Q Well, Officer, let's back up for a minute.

Did there come a time when you put your hand over your gun?

A There came a time when I placed my hand on my gun, yes.

Q And that was before the gun came out of the holster, true?

A True.

Q And when the gun came out, you had it in your right hand, true?

A Not solely, sir.

Q Officer, do you remember being questioned at the District Attorney's Office on October 2nd, 1972, at one p.m. in the afternoon and you were interrogated by a Frank P. Dillon, an Assistant District Attorney,

and there were various detectives there? Do you remember that happening, Officer?

A I am aware I was questioned by the District Attorney. I am aware it was in October. As to the time and the date, I am not certain.

Q Well, Officer, let me hand you this transcript that's previously been delivered to court under subpoena and I direct your attention to page 14, and I will ask you, sir, did you give these answers to these questions?

"QUESTION: You then put your hand over by your gun. Is that right?

"ANSWER: Yes, sir.

"QUESTION: And when the gun came out, you had it in your right hand?

"ANSWER: When the gun came out it was in my right hand; yes, sir."

Did you give those answers to those questions, sir?

A That's what I just testified to, sir.

MR. WEITZ: If your Honor please, it calls for a yes or no.

MR. GARDNER: They are not inconsistent.

MR. WEITZ: Judge, that's argumentative.

THE COURT: Wait a minute, wait a minute.

This witness said the answer is yes, and go on.

MR. GARDNER: If your Honor please --

THE COURT: Go on and overruled.

MR. GARDNER: It's not an objection, sir. I believe if some part of something is read under the Federal Rules --

THE COURT: Of course, you will be able to read the whole thing.

MR. GARDNER: I understand that, your Honor.

THE COURT: But you have to wait for your turn.

Q Now, you say, Officer -- let me read a few more questions, please. Let me go back one question.

MR. GARDNER: What page are you on?

Q The same page, 14.

"QUESTION: Now, as you were inside, as he was inside the car and you felt him at your gun --

"ANSWER: Yes, sir.

"QUESTION: -- you then put your hand over by your gun. Is that right?

"ANSWER: Yes, sir."

Now, Officer, when you asked this question -- when you answered this question as to feeling George Haber at your gun, how did you feel him at your gun,

Officer? What did you feel?

A I felt the holster move, being tugged on, pulled. I felt the pressure on the belt where the holster was attached to.

Q And when you felt movement and pressure, you were struggling with this young man, weren't you?

A Yes, sir, I was.

Q So when you felt movement and pressure about some part of your body, as you have described a moment ago, you put your right hand on your gun?

A Uh,huh.

Q True?

A Yes, I reached for my gun.

Q And you removed it from your holster, didn't you?

A I didn't say that, sir.

Q I am suggesting to you now, sir, that that's what you did. Did you do that, sir?

MR. GARDNER: I object, if your Honor please. If he wants to put a question, let him put a question. I don't think his suggestion has any materiality.

THE COURT: Your testimony is not called for. You have been asking questions.

Q Well, Officer, when the gun came out of your holster, it was in your right hand. Isn't that correct?

A It was in both our hands, yes.

Q Officer --

MR. GARDNER: I didn't hear that.

MR. WEITZ: He said it was in both our hands.

Q I will read the question and answer to you when the DA was asking you this.

"QUESTION: And when the gun came out, you had it in your right hand?

"ANSWER: When the gun came out, it was in my right hand; yes, sir."

Was that true when you said it then, sir?

A Yes.

MR. GARDNER: It would be clear on the record, if your Honor please, Mr. Weitz, would you please acknowledge that you're reading from the same page 14?

MR. WEITZ: I certainly am.

THE COURT: All right, we will suspend now, ladies and gentlemen, until 2:15.

Don't discuss the case.

(The jury leaves the courtroom.)

(Luncheon recess.)

(The jury enters the courtroom.)

(Robert Sehlmeyer resumes the witness stand.)

BY MR. WEITZ:

Q Now, sir, at some time after you had the gun in your right hand, did you strike George Haber with the butt end of the gun?

A Yes, sir, I did.

Q Was he in the car when you struck him with the gun?

A Yes, sir, he was.

Q And di you strike him more than once with the gun?

A Yes, sir, I did.

Q And did you strike him hard enough to break the handle of the gun?

A I don't know whether the handle broke at that part of our struggle, but I do know the handle was broken.

Q Now, Officer, that gun is up before you now. Did you replace the handle? Is that it?

A Yes, sir, I had.

Q Is it possible for you to close that chamber -- did both sides of this handle come off?

A Yes, sir.

Q And when you hi[illegible] him with the gun would you

tell me how you held this gun when you hit him with it. Put both hands on it and show me how you held it when you struck this young boy with that gun.

A During the ensuing struggle I am not sure exactly how I was holding it.

Q Did you hit him with the butt?

A Yes, I hit him with the butt end of it, yes.

Q And you hit him more than once, didn't you?

A Yes, sir, I did.

Q And he was in the car when you did that?

A We were both in the car.

Q And were you then holding the gun by the cylinder or the barrel when you did that?

A Probably.

Q Would you put your hand on the cylinder or the barrel and show me how you were holding it.

A I don't know how I was holding it, but it was probably this way (indicating).

Q And, Officer --

A Yes, sir.

Q When you were striking this boy with that gun, did he put up his hands?

A His hands were flailing.

Q When his hands were flailing, were they flail-

ing at the gun you were striking him with?

A They were flailing at me, sir.

Q Wasn't he trying to ward off that gun while you were fighting?

MR. GARDNER: Objected to, your Honor; operation of the mind of another party. If he wants, he can ask what he was doing and what actions he observed as far as George Haber are concerned.

THE COURT: I think he is asking that question.

Q Well, Officer, did there come a time when you stopped hitting him with that gun?

A Yes, sir.

Q Did you holster the gun after you stopped hitting him with it?

A No, sir.

Q Well, did there come a time after you struck him with the gun that you removed him from the car?

A I did not in fact remove him. The struggle ensued where we both came out of the car, sir.

Q Well, you never entered the car, did you, sir?

A Yes, sir, I was in the car.

Q That was when you were hitting him you were in the car? While you were hitting him with the gun?

Is that what you mean?

A While I was in the car is when it was necessary for me to use the gun, yes.

Q Officer, did you enter the car for the purposes of hitting him with the gun butt?

A No, sir.

Q Were you inside the car when you were hitting him with the gun?

A Yes, sir.

Q Were you completely in the car or was only part of your body in the car?

A To my recollection, to me, possibly the lower extremities of my legs may have been outside of the car.

Q When you say lower extremities of your legs, what do you mean, Officer?

A From the knee down, probably.

Q So that you were leaning into the car and hitting him with your right hand, with a gun in your right hand?

A I was inside the car and we were struggling, yes. And during the struggle I struck him with the gun.

Q And he was still in that front seat?

A Yes, sir.

Q Well, Officer, did you straighten up or re-

move your body from the car? 395

A Yes, sir, I did.

Q All right.

And when you removed your body from the car, did you holster your gun?

A No, sir, not at that point.

Q Did you pull this boy out of the car at any time, Officer?

A I don't know what you mean by the term pull him out of the car.

Q Did you yank him out of the car?

A No, I did not yank him out of the car.

Q Did you lay your hand on him and remove him from the car?

A No, sir, I did not.

Q Did there ever come a time, sir, when you had him by the wrist and you threw him up against the left rear door of the car?

A I cannot recall doing such a thing.

Q Do you deny doing it?

A We were struggling. As to whether I threw him against the car --

Q You don't deny it?

A I do not know.

MR. GARDNER: I object, your Honor.

Q Do you deny doing it?

A I do not know.

Q Did you ever have the boy by his hair? Ever hold him with one hand by his hair, whether the left or the right, about what I indicated (indicating)?

A Yes, sir.

Q Was that with the left or right hand that you were doing that?

A I had him by the hair with my left hand.

Q Did you have the gun holstered at that time?

A No, sir.

Q Were you outside the car when you had him by the hair?

A Yes, sir.

Q Officer, are you familiar with this weapon? You had it for over seventeen years. Is that right?

A Yes, sir.

Q This gun cannot go off accidentally. Isn't that true?

MR. GARDNER: I object, if your Honor please. I don't know what counsel means by that. I object to the form of the question, if your Honor please.

THE COURT: I will let this witness answer as

to whether it can go off accidentally.

A I don't understand the question.

Q All right, Officer.

This gun requires a finger on the trigger for it to go off. Isn't that true, sir?

A Yes, sir, it does, or something on the trigger.

Q This gun has a trigger guard, does it not?

A It does, sir.

Q This gun has a safety, does it not, an internal safety, does it not?

A Yes, sir.

Q This gun has a recoil when it is fired, does it not?

A It does, sir.

Q And by recoil, it's a movement of the gun, right?

A Yes, sir.

Q You can feel it go off when it's fired, true?

A Yes, sir.

Q And you see a flash when it's fired, true?

A Possible.

Q Well, have you fired that gun on many occasions, Officer?

A Yes, sir.

Q And you have seen a flash come out of the muzzle of that gun, come out on many occasions, haven't you, Officer?

A On occasions, especially on night firings, sir.

Q And these events took place at night, did they not?

A They did, sir.

Q And, Officer, was this trigger pulled while you had this boy by the hair?

A I do not know, sir. I am not aware of whether I had him by the hair at the time that the gun went off. I don't know.

Q When you were at the left rear side of this car, was a shot fired from that weapon?

A According to what I can ascertain, yes, a shot was fired.

Q Well, Officer, you were there, were you not?

A I most certainly was, sir.

Q You had possession of the gun, did you not?

MR. GARDNER: I object, if your Honor please. When he says possession of the gun, I am not clear whether counsel means he had full possession of it physically or whether or not it was his gun and the same gun we are talking about now.

I object to the form of the question.

THE COURT: The officer can handle it. If he didn't have complete possession, he should so state.

THE WITNESS: I had partial possession of the gun.

Q Did you have your hand on the butt end?

A At what point, sir?

Q At the time the first shot went off.

A I do not know, sir.

Q Did you have your hand on the barrel end?

A My hand was on the gun. As to exactly where, I do not know.

Q Officer, is there a chamber on that gun that you now have in an open position?

A There is, sir.

Q When that's closed, is there a space behind the chamber?

A Yes.

Q As it is in the position now?

A Yes, sir, it is.

Q When that gun is fired, do gases and debris come out of that space behind the chamber?

A I assume gases would come out there. As to debris, I'm not qualified to say.

Q And powder comes out of that end just as well as out of the muzzle. Isn't that true, Officer?

A I would not be qualified to say.

Q Officer, when you became a police officer, did you study the function of this weapon?

A I studied the function of the weapon, yes.

Q And did you study how a bullet is propelled from that weapon?

A I was informed as to how it was propelled from the weapon.

Q And you know how it was propelled, do you not?

A I have a working knowledge of the weapon, yes.

Q Tell us how that weapon is fired and how the bullet is propelled out of that weapon.

A The bullets are loaded into the chamber, which is the round portion of the revolver. The chamber is then closed. The gun can be fired either single or double action. If it's fired single action, the hammer is brought to the rear until it comes to a stationary position. Pressure and then applied to the trigger. This releases the hammer. The hammer moves forward. The firing pin strikes the primer.

Q And what is the primer, Officer?

A Primer is the central part of the bullet in the

rear which is the initial force to ignite the powder that is inside the chamber.

Q And is that power ignited?

MR. GARDNER: I think if he asks him a question and he is interested in it, he should get the whole answer.

THE COURT: Let him answer.

THE WITNESS: The ignited powder in the primer then ignites the powder charge in the cartridge itself. The burning of the powder forms a gas. The expansion of the gas forces the projectile from the end of the cartridge down the barrel and out the muzzle end.

Q And you have gases and powder in various states of ignition coming out of the front end as well as out of that space behind the chamber. Isn't that so, Officer?

A I know there are expanded gases coming out the front. I am not qualified, I am not a ballistics expert, as to whether they come out the rear, and if so, how often.

Q You never learned that?

A No, sir.

Q Well, Officer, when the gun went off the fir[illegible]

time, you say someone else's hands were on the gun?

A Yes, sir, I do.

Q Whose hands would you say were on the gun?

A George Haber.

Q Where do you say they were?

A I could not say exactly. I know we were struggling for possession of the gun. As to where his hands were exactly, I could not say.

Q Officer, did you feel his hands on the gun or did you see it?

A I felt his hand.

Q Where did you feel his hand?

A Against my hand.

Q On what part of the gun was your hand?

A I do not know, sir. I do not know whether it was on the chamber or on the barrel or on the trigger guard or on the butt itself.

Q Are you saying both of you had your hands on the gun at the same time?

A That's what I'm saying, sir.

Q Officer, if somebody were to pick this gun up and tried to fire it and somebody else were to hold the chamber and you were struggling, you say to this jury tight, trying to grab this gun, right, with this

other gun? He was trying to grab it away from you, right?

A Correct, sir.

Q Isn't it true that one could hold the chamber and prevent that from being fired? Isn't that true, Officer? Isn't that true?

A I don't know from my knowledge, sir, and I wouldn't want to try it.

Q Because you're not a ballistics expert?

A Exactly.

Q Officer, when that gun went off for the first time, it didn't strike you, did it?

A It did not.

Q When that trigger was moved the first time, it wasn't pointed at you, was it?

A I assume it was not pointed at me when the trigger was pulled, no.

Q Officer, when that trigger was pulled the first time, you were facing the car, weren't you?

A I don't know, sir. I was struggling. Our position was constantly changing. I couldn't say at that particular incident --

Q Officer, weren't you by the left rear door of this car when this gun was fired for the first time?

A Yes, sir. We both were.

Q And weren't you facing the left rear car door of this car when that gun was fired for the first time?

A I do not know, sir.

Q Officer, didn't you slam this kid up against the left rear door of your car?

MR. GARDNER: I object to the form, sir. We called him a kid, a young boy. It's for the jury to decide.

THE COURT REPORTER: Your Honor, when they both yell at the same time, I cannot make a record at all.

THE COURT: Neither of them have that much respect for each other. The proper way is to wait until the objection is completed and have a ruling on the objection and then proceed.

MR. WEITZ: I will withdraw the question, with your Honor's permission, your Honor. May I do that?

THE COURT: Yes.

Q Did you slam George Haber up against the left rear door of your car?

THE COURT: He has answered that three times, no. And your repetitiveness of questions shall

not and should not create any inference in the jury's mind that the same occurred. It was an old tactic started about 1933 by a man who thought he repeated himself often enough it would be accepted.

MR. WEITZ: I was four years old at the time and I certainly didn't know about it.

THE COURT: Apparently you thought you learned something from history if you keep repeating something to get the message across. But this jury knows that's not the way it works.

MR. WEITZ: I will have to produce a witness and I know that, Judge.

Q Officer, did there come a time when you came to the rear of the automobile?

A Yes, sir.

Q And when you got to the rear of the automobile -- by the way, Officer, you had your hand on the gun, you say, when it went off for the first time?

A Yes, sir.

Q Did you ever testify that you never felt it go off?

A Yes, sir.

Q Did you ever testify that you never saw it

go off?

A Yes, sir.

Q The gun does have a recoil and flame at night, does it not?

A Definitely, sir.

Q Is that testimony true when you say you never saw it go off or felt it go off?

A Yes, sir.

Q So you were unaware that it had actually fired, Officer?

A I heard a loud report, but I neither felt the recoil nor did I see a flash.

Q So, Officer, if you didn't see a recoil or feel a flash or see a flash, all you heard was a noise, how do you know where George Haber's hands were at the time this gun was fired, or is it something you imagined?

MR. GARDNER: Objected to, if your Honor please.

THE COURT: Yes, strike out the last part.

A I know his hands were on the gun because from the time we left the car until we got to the rear and around to the back, it was a constant struggle --

Q Are you saying that from the time --

A -- for the possession of the gun.

Q Are you saying from the time George Haber got

out of that car until the time the gun was fired for the first time, he had his hand on your gun the entire time, never let go of it?

MR. GARDNER: Objection, if your Honor please. It's not what he said. It's argumentative.

THE COURT: You said what you said. Don't take what he says. You say what happened.

THE WITNESS: When he came out of the car, as I said, it was a constant struggle for possession of the gun.

Q Are you saying his hands were on the gun constantly?

A I could not say that, no, sir.

Q Your hands were on that gun constantly, were they?

A That I could not say either, sir.

THE COURT: Are you saying this was a constant struggle for the gun?

THE WITNESS: That's right, sir.

Q When you say struggle for the gun, sir, when you use that term, do you have in your mind somebody having his hand or hands on the weapon?

A I mean we both had our hands on the weapon.

Q Did you ever have possession of the weapon

by yourself?

A Yes, sir.

Q Did you holster your weapon when you had it in your sole possession?

A No, sir.

Q Did you eventually come to the rear of the automobile?

A Yes, sir.

Q Was the gun fired again?

A To the rear of the automobile, yes.

Q And at the time that gun was fired at the rear of the automobile, did you have one or more of your hands on that gun?

A Yes, sir, I did.

Q And was that your right hand, Officer?

A Yes, sir, it was my right hand.

Q And did you have your right hand on the butt end of the gun, Officer?

A At what point, sir?

Q The time it was fired when you were at the rear of the automobile.

A I couldn't say for a certainty, sir.

Q Officer, was that gun discharged by the pulling of the trigger when you were at the rear of the auto-

mobile and you had your right hand on that gun?

A It could have been discharged either by the pulling of the trigger or by the pushing of the trigger.

Q Officer, did you have your finger on the trigger?

A Not to my knowledge.

Q Officer, would you pick that gun up and show us how you were holding the gun when you were at the rear of the automobile and you had your right hand on it and you did not have your finger on the trigger.

A At what point are you speaking of, sir?

Q When it was discharged, Officer.

A As I said, when it was discharged I do not know when my finger was --

Q I asked you, sir, to pick it up and show us how you were holding it.

MR. GARDNER: Objection. He doesn't know which point of time he is making reference to.

THE COURT: He said as best as you can recollect at the time the second shot took place, where his right hand was on the gun, if he can recollect.

Q Would you hold it up and show us.

A To the best of my recollection, it was in the rear of the gun, possibly in this manner (indicating). It

may have been lower or higher. I have no idea.

MR. WEITZ: Would the Court describe for the record the way it is, your Honor, so we can be sure.

THE COURT: He had his hand with his index and his next to the index finger on the barrel and his thumb on the top of the barrel and his so-called trigger finger and middle finger on the front of the trigger guard.

Q And will you tell us, sir -- would you hold it in thatposition for a moment.

Would you tell us, sir, at that moment, were you facing George Haber?

A Yes, sir, I was.

Q And were you directly in front of him or off to the side of him or what?

A I would say I would be directly in front of him or he would be in front of me, whichever way you want to put it.

Q Face to face, so to speak?

A Yes, sir.

MR. GARDNER: If your Honor please --

Q Where would George's hand --

MR. GARDNER: If your Honor please, I am di-

recting an objection to the Court.

If your Honor please, I object to Mr. Weitz now in front of the jury having the witness hold the weapon. He is now on three other questions --

MR. WEITZ: I am on the same question.

MR. GARDNER: -- with no materiality to the position of the weapon.

THE COURT: Put the gun down.

Q Would you tell us where George Haber's hands were?

A George Haber's hands were moving constantly, on me, on the gun. There was no specific point, unless you can pin it down to an exact moment. And even then, I probably couldn't tell you exactly where his hands were.

Q Well, which hand or hands were on the gun as you had it with his fingers around the trigger guard as you just showed us and your other fingers on the butt end and the butt in the palm of your hand? What part of the gun were his hands on at that moment when the gun went off?

A I could not tell you, sir.

Q Was it his right hand or left hand?

A Again, I could not tell you, sir. As I said --

Q Well, did you see his hand on the gun or are you guessing?

A I saw, I felt; but as I said, it was constantly changing.

Q Officer, at that moment when it went off when you had your hand on the gun, as you described for us, and when you say you saw his hand on the gun, which hand did you see on the gun?

A At the instant the gun went off time did not stop. There was not an instant replay that I could picture exactly where everything was at that particular moment.

Q You don't even know if he had his hand on the gun. Isn't that true, Officer?

A I know we were struggling for the gun at that point.

Q Officer, you don't know if he had even a finger on the gun at that moment when it went off. Isn't that true, sir?

MR. GARDNER: Objection, if your Honor please.

THE COURT: His answer was we were struggling for the gun at that time, at that point. That is an answer.

MR. WEITZ: Judge, that is a conclusion.

THE COURT: That is an answer. Life is not quite that precise.

MR. WEITZ: If your Honor please, may we approach the bench for a moment?

THE COURT: No.

MR. WEITZ: Pardon me?

THE COURT: No.

MR. WEITZ: May I make a motion later on with respect to this particular juncture of the trial without waiving my rights by continuing, your Honor?

THE COURT: Yes.

MR. WEITZ: Thank you.

Q When this gun was fired a second time, Officer, did you see what happened to George Haber?

A Yes, sir.

Q What happened to him?

A He fell to the ground, sir.

Q And was that at the point where you both were when the gun went off?

A I beg your pardon, sir? I didn't understand you.

Q Did he fall to the ground at that point where you both were when that gun went off a second time?

A Yes, sir. He fell to the ground there.

Q And did he go right down to the ground?

A Yes, sir.

Q Did you move him at all?

A No, sir.

Q Did you move your car at all?

A No, sir.

Q Did somebody come by at this point?

A Someone came by just shortly afterwards, yes, sir.

Q Was that a civilian?

A The first people I recall being there were members of the Police Department, sir.

Q Before any civilians came by?

A The first people that I recall being there are police officers, sir.

Q When you say that you recall, Officer, is there a period of time that you don't recall?

A No, there is not a period of time I do not recall. I did not make an inventory at that particular moment as to who was there, sir.

Q Do you remember anybody coming up to you and asking you how you were?

A No, sir, I do not.

Q Did you see civilians in the area after fellow officers arrived?

A Yes, sir, I did.

Q How long after George Haber was shot and fell to the ground was it when the first police officer ar-

rived?

A I would only have to estimate, but I would say possibly a minute, maybe two.

Q And who was the first one that you saw?

A I do not know his name, sir.

Q Officer, where were you when the first police officer came?

A Standing on the left side of the car in the vicinity of the left rear fender.

Q And you were holding on to your weapon, weren't you, Officer?

A Yes, sir, I was.

Q And you had to be told to put it away, didn't you, or didn't that happen, sir?

A The officer who arrived told me to put my gun back in my holster; yes, sir.

Q Did that officer take any of your equipment from you?

A No, sir.

Q Did anybody during that evening take any of your equipment from you?

A Yes, sir.

Q And when you turned over your equipment, did you turn over everything that you had with you on that

night?

A I turned over everything I had in my possession at that time in the hospital.

Q Had you lost -- well, let me ask you this, Officer: Did you give him your belt?

A Yes, sir.

Q And the holster?

A Yes, sir.

Q And the cuffs?

A I assume so. I don't know, sir. I gave them everything I had on when I got to the hospital.

Q Well, did you remove anything from your person from the time you had this struggle until the time that you turned over your equipment?

A Did I lose anything?

Q Did you remove anything from your person?

A I removed my jack, yes.

Q Pardon me?

A The jack was removed.

Q Did you remove anything else?

A Not that I am aware of, sir.

Q Officer, did there come a time on that evening when Detective -- when a Sergeant Rubino appeared?

A I believe he was at the scene, sir, yes.

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Q Who was Sergeant Rubino?

A He is a highway patrol sergeant.

Q Is he a fellow officer?

A A fellow officer, yes; a member of the Nassau County Police Department.

Q Did you get into your car with Sergeant Rubino following this shooting and have a conversation with him?

A No, sir, I did not.

(Whereupon, there was a pause in the proceedings.)

MR. WEITZ: May I have just one moment, Judge?

(An additional pause in the proceedings.)

Q Do you know Patrolman Eric R. Hilbig, H-i-l-b-i-g? Do you know Patrolman Eric R. Hilbig?

A I know of him, yes, sir; not on a personal nature.

Q I am going to show you this.

MR. WEITZ: May I have it marked for identification, your Honor?

THE CLERK: One page document marked for identification as Plaintiff's Exhibit 29.

Q I show you this document, Plaintiff's Exhibit 29 for identification, and ask you to read it to yourself, Officer.

(Document referred to is handed to the witness.)

A Yes, sir.

Q Does that refresh your recollection that Sergeant Rubino came along and you and he got into the car and discussed the event right after it took place?

A I don't recall speaking to Sergeant Rubino.

Q You don't recall that?

A No, sir.

MR. WEITZ: I offer that document in evidence, your Honor.

THE COURT: Let me see it -- show it to Mr. Gardner first.

(Document referred to is handed to Mr. Gardner.)

MR. GARDNER: I am going to object, if your Honor please.

THE COURT: Let me see it.

MR. GARDNER: I suggest --

THE COURT: Let me see it.

MR. GARDNER: I have to make a comment, your Honor

THE COURT: Not now, not in the front of the jury.

Let me see it.

MR. GARDNER: May I then respectfully direct your Honor's attention with great respect to the signer of that document.

THE COURT: I understand the nature of your objection, at least I think I do. But let me see it.

(Document referred to is handed to the Court.)

THE COURT: Step up, gentlemen.

(The following takes place at side bar out of the presence of the jury:)

THE COURT: On what theory?

MR. WEITZ: This is part of the official investigation, your Honor. It's an admission and it's a document made in the regular course of --

THE COURT: Admission by whom?

MR. WEITZ: By the Nassau County Police Department.

MR. GARDNER: As to what?

MR. WEITZ: Of the events described in there.

THE COURT: Does it constitute an admission insofar as his observations of their being seated in the car together?

MR. WEITZ: Certainly.

MR. GARDNER: The question he put to him is: Does he remember being seated in the car with Rubino.

THE COURT: Doesn't this say what it says, the last sentence in the fourth full paragraph --

MR. GARDNER: Your Honor is quite correct. So I take it the purpose is to establish that he was sitting in the car talking to Rubino?

THE COURT: That's correct. I don't think it should go in as to why -- or what he was questioned with Sergeant Rubino; but sitting in a superior car with Sergeant Rubino. But to ask as to --

MR. WEITZ: It's conversation, at least, Judge.

THE COURT: You don't know. They could be sitting there looking at each other.

MR. WEITZ: The question means that the lips were moving, Judge.

THE COURT: I think that's a little bit questionable, introducing it now, unless you have more to establish it. This may be nothing more than an impression, if you produce this witness. He may say he overheard none of the conversation.

MR. WEITZ: Well, Judge, it really goes to

the weight, rather than the admissibility, your Honor.

THE COURT: No. It may have been a wholly unwarranted conclusion.

MR. WEITZ: Isn't your Honor's speculation unwarranted?

THE COURT: I think you have to call Patrolman Hilbig, if you want to get that aspect of it in. I am a little upset with this observation that may well be an impression rather than a fact. There is no doubt in my mind that what he saw is admissible that the sergeant was sitting in a SPU car. Also, it -- he denied that. And it is also that the sergeant may have been questioning him how he was feeling and not about this incident.

MR. WEITZ: But at least to the fact that they were in the car --

THE COURT: You haven't asked him, were you at one time sitting in the car with Rubino.

MR. WEITZ: I will ask him.

As long as we are at the bench, your Honor, may I make my motion now?

THE COURT: Yes.

MR. WEITZ: The Court will recollect at a

time when I was asking this witness to describe the position of the decedent's hands with respect to the weapon at the time the weapon was fired, I was attempting to press this witness for what I felt was his best recollection and best description at that precise moment subsequent to which time he had already described the position of his own hand on the weapon.

THE COURT: And he had already testified he didn't know where the witness' hands were. You asked again and there was an objection -- no, he said he didn't know, but that there was a struggle; at which point you asked again and there was an objection. And I said life wasn't that precise. And I think it's perfectly proper if a man has a struggle, one doesn't know where one's opponent's hands necessarily are.

MR. WEITZ: I understand what the Court's position is. I don't think the Court has done this deliberately and I want to state this for the record. However, I do think that your Honor has accidentally conveyed to this jury the Court's impression with respect to the credibility of this witness on this, what to me is a crucial point.

And I think it was an unfortunate remark. I don't know how it can be vitiated or how any instruction can be viciated.

THE COURT: I don't intend to viciate it.

MR. WEITZ: Well, I am moving for a mistrial based on that.

THE COURT: Your motion is denied.

There is no basis for pressing a question of that nature when you get an answer which is complete on its face. He had already testified he didn't know. You were back at it, as you are innumerable times during the course of this cross-examination of a witness you have called to the bench. And I will describe what has occurred here since nine o'clock this morning as a merciless cross-examination of one's own witness. I have not interrupted the same. I am not saying you are not entitled to do so, but this is not the normal way of presenting a case.

In cross-examination of this kind when you're dealing with your own witness as distinguished from a witness which was produced by another side, you ask a question once and you are normally bound by that answer. You are not entitled to go back

over it three or four times. He gave you an answer which is the only answer he could give under the circumstances. And you went after it again.

Under those circumstances I think the Court's comment was -- the only comment I could reasonably make.

MR. WEITZ: If your Honor pleases, I will not say what you could have said to me, but I feel that that particular comment was a judgmental comment rather than a direction to counsel. And for that reason I make the objection.

THE COURT: No, it's not a judgmental comment. And it's not to convey to the jury, nor do I think it did convey to the jury any more than, as I said, recently you are not satisfied in asking a question once, but seem to want to ask it three or four times. And I think, as I commented once to Mr. Gardner when he made an objection for the fifteenth time on his point, it's your style. It's an unfortunate style.

MR. WEITZ: I have an exception to your ruling.

And this document, Judge --

THE COURT: Ask the other question and we will

see.

(The following takes place in open court and in the presence of the jury.)

BY MR. WEITZ:

Q Officer, were you ever seated in a SPU car with Sergeant Rubino of the Highway Patrol Bureau?

A Not that I can recall, sir; no, sir.

MR. WEITZ: I offer this document.

THE COURT: Yes, I will take the appropriate sentence from that document with the editing that I indicated must be made.

MR. WEITZ: And I am not waiving my rights by that, am I, Judge? I am offering the document including that and I understand your Honor is limiting it.

THE COURT: At this point. Of course, if you produce the appropriate proof --

MR. WEITZ: Sure.

THE CLERK: Plaintiff's Exhibit 29 received in Evidence as indicated.

(So marked.)

MR. WEITZ: May I read that to the jury, your Honor?

THE COURT: It all depends on what you are

going to read. You better come up again.

I think what we better do is take our five minute recess, ladies and gentlemen.

Don't discuss the case. This way you can take a few minutes.

(The jury leaves the courtroom and the following takes place out of the presence of the jury:)

THE COURT: Come up.

(The following takes place at side bar:)

THE COURT: Any objection to reading down to that line?

MR. WEITZ: I don't have to read it, if we can have a stipulation if he was in fact in the vehicle with Sergeant Rubino.

MR. GARDNER: I don't know that.

MR. WEITZ: If I read this statement it would --

MR. GARDNER: You offered the statement and it was admitted with some limitation.

MR. WEITZ: And was blank blank, by Sergeant Rubino?

THE COURT: No. He was sitting in a SPU car. Of course, it doesn't even say Sergeant Rubino was in the car either, does it?

MR. GARDNER: No. It says Sergeant Sehlmeyer

was sitting in the SPU car.

THE COURT: Sergeant, let me ask you this question:

THE WITNESS: Yes, I am sorry.

THE COURT: Were you at any time sitting in a SPU car?

THE WITNESS: Yes, sir. That's the first car that I realized had come to the scene.

THE COURT: You were sitting in it?

THE WITNESS: Yes, sir, I was.

THE COURT: Do you know if Sergeant Rubino was ever in the car?

THE WITNESS: Not to my knowledge, sir.

THE COURT: Was he ever at a window of the car near you?

THE WITNESS: If he was, I don't recall, Judge. At that particular time I was a little shook and I was in the car. They were the first ones that I realized had arrived at the scene.

THE COURT: You saw him there, Sergeant Rubino?

THE WITNESS: No. The CPU car and the two CPU men.

MR. WEITZ: Do we know what CPU stand for,

Judge?

THE WITNESS: Crime Prevention Unit.

THE COURT: Did you see Sergeant Rubino at any time while you were seated in the car?

THE WITNESS: No, sir, not that I can recall; no, sir. As I said, he must have arrived at the scene. He was on duty.

THE COURT: Can we resolve this by saying, and appeared to be questioned?

MR. WEITZ: I would consent to that, Judge.

MR. GARDNER: Fine. I will consent to that.

THE COURT: Then you can read it. That will resolve the problem.

(A recess was taken.)

(The jury enters the courtroom and the following takes place in open court and in the presence of the jury:)

MR. WEITZ: May I proceed, your Honor?

THE COURT: Yes.

MR. WEITZ: I want to ask the witness one question, your Honor.

BY MR. WEITZ:

Q Officer, a CPU car, what does CPU stand for?

A Crime Prevention Unit.

Service of three (3) copies of
the within Appendix Vols. I & II is
hereby admitted this 4th day
of March, 1977

Boren + Gardner by Biff + Gleason, P.C.

Attorney for Defendants-Appellees